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Ontario  
Labour Relations  
Board

Publication

# Decisions May 83

CA20N  
LR  
- 054



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# ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the  
Ontario Labour Relations Board

Cited [1983] OLRB REP. MAY

Selected decisions of particular reference value are  
also reported in *Canadian Labour Relations Boards  
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TORONTO LOCAL 211

37-L





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**0151-83-R; 0161-83-R; 0249-83-R** International Brotherhood of Electrical Workers Local 1687, Applicant, v. **Campbell Red Lake Mines Limited** Detour Lake Project, Respondent, v. Sudbury Mine, Mill and Smelter Workers Union, Local 598, Intervener #1, v. United Steelworkers of America, Intervener #2; United Steelworkers of America, Applicant, v. Campbell Red Lake Mines Limited Detour Lake Project, Respondent, v. International Brotherhood of Electrical Workers, Local 1687, Intervener #1, v. International Union of Operating Engineers, Local 793, Intervener #2, v. Sudbury Mine, Mill and Smelter Workers Union, Local 598, Intervener #3; International Union of Operating Engineers, Local 793, Applicant, v. Campbell Red Lake Mines Detour Lake Project, Respondent.

Certification - Practice and Procedure - Work project location isolated and limited access available - Employees not having proper notice of application or opportunity to respond to notice -Board extending terminal date - Subsequent application filed by second union treated as filed on application date of first union - Employer fearing disruption resulting from rivalry of four unions attempting to organize - Board refusing request to ban access or lay general rules of conduct for unions - Employer advising one union of presence of second union not constituting unlawful support

**BEFORE:** R.O. MacDowell, Vice-Chairman and Board Members  
J. A. Ronson and P. J. O'Keeffe.

*APPEARANCES:* Elizabeth J. Shilton Lennon, Mo Sheppard, Homer Seguin and Mike Farrell for the United Steelworkers of America; R. Drmaj for the respondent; A.M. Minsky, J. Redshaw and S. Tatrallyay for International Brotherhood of Electrical Workers, Local 1687, and International Union of Operating Engineers, Local 793; L.C. Arnold and Ray Duhaime for Sudbury Mine, Mill and Smelter Workers Union, Local 598.

## **DECISION OF THE BOARD;** May 20, 1983

1. The name of the respondent is amended to read: "Campbell Red Lake Mines Limited Detour Lake Project".
2. This is an application for certification by the United Steelworkers of America, which was scheduled for hearing together with certain related applications filed by the International Brotherhood of Electrical Workers, Local 1687 and International Union of Operating Engineers, Local 793.
3. The respondent, as its name indicates, is a mining company currently engaged in a project at Detour Lake in the District of Cochrane. It employs approximately 120 employees with various skills or trades. The four unions each seek certification as the bargaining agent for some or all of these employees.
4. The precise segment of the work force which each union seeks to represent need not be detailed here since the appropriateness of their proposed bargaining units is a critical issue in dispute in this case. It suffices to say that the United Steelworkers of America (the "Steelworkers"), and the Sudbury Mine, Mill and Smelter Workers Union,



Local 598 ("Mine Mill") each seek to represent a broadly based "all employee", "industrial" bargaining unit including all of the respondent's employees on the project (with certain exceptions not here relevant), while the International Union of Operating Engineers, Local 793 ("the IUOE") and the International Brotherhood of Electrical Workers, Local 1687 ("the IBEW") seek a more narrowly defined "craft" bargaining unit including only those employees exercising skills within their respective trade jurisdictions. Whether the IBEW and IUOE are entitled to these more narrowly defined bargaining units will depend on the application of section 6(3) of the Act to the particular circumstances of this case.

### The Terminal Date Problem

5. Although not first in time, the principal certification application is that of the Steelworkers because of the number of individuals potentially included in its proposed bargaining unit and the depth of its support. It is in that application that the rival industrial union, Mine Mill, has intervened. The IUOE and IBEW have also intervened to protect their claim to represent employees within their respective craft jurisdictions. In addition, like the IBEW, the IUOE has filed its own certification application in respect of certain heavy equipment operators whom it claims fall within its own craft bargaining unit.

6. Unfortunately, the vagaries of the mails, the isolated location of the project, and the respondent's work scheduling system, have combined to create a situation in which, in our view, the persons potentially affected by the Steelworkers' application have not had adequate notice thereof. The evidence before the Board establishes that the respondent received notice of the Steelworkers' application on April 25, 1982. That notice was transmitted to Timmins, Ontario on April 27, 1982. The notice to employees potentially affected, in Form 6, was posted on Thursday, April 28, 1982 at approximately 1:00 p.m. The terminal date (the date by which employee objections or interventions by other unions must be filed) was fixed for May 3, 1982. In the ordinary course five calendar days and three working days would have been sufficient notice of the Steelworkers' application. But it was not sufficient in the circumstances of this case.

7. There are no roads in to the Detour Lake Project. The only access to the area is by air. The employees both work and reside on property owned and controlled by the employer. There is no Post Office close by and, accordingly, no way to communicate an objection or intervention in the manner prescribed by Form 6. Moreover, on April 27, 1982 (that is the day before the posting of this Notice of Application) some 29 employees or about 25% of the total labour force left the site for their scheduled period of time off. The following day at about 2:00 p.m. another 25 employees flew out. In consequence, between April 28th and May 3rd, something over 40 per cent of the total work force potentially affected by the Steelworkers' application for certification had no reasonable opportunity to consider or respond to the Board's notice of that application.

8. In the circumstances, the Board is persuaded that it should extend the terminal date originally fixed for the Steelworkers' application until May 27, 1983. That extension of the terminal date will give those employees who might wish to respond to this proceeding an opportunity to indicate such desire. In view of the number of membership cards filed by the IUOE shortly after the terminal date, but notwithstanding the notice

problem referred to above, the Board has also determined that it should treat the certification application filed by the IUOE as having been made on the date of the making of the original (Steelworkers) application, and further that the IUOE and IBEW applications, should have the same extended terminal date as that fixed for the Steelworkers' application. These determinations are made pursuant to section 103 of the *Labour Relations Act*.

### The Access Issue

9. A little over a year ago, pursuant to section 11 of the *Labour Relations Act*, the Steelworkers sought access to the respondent's employees. As we have already noted, the Detour Lake project, where the employees work and reside, is an isolated location accessible only by air. That application was settled on terms which need not be set out here, save to note that it was granted on terms which would minimize disruption of the respondent's operations. Subsequently, it appears that the respondent has also accorded approximately the same access to representatives of the Mine Mill. No specific access has been given to the IBEW or the IUOE nor has any such access been sought.

10. Counsel for the respondent expressed his concern that the extension of the terminal date could spark a period of inter-union rivalry in which all four unions would seek access to the respondent's work site; and, he noted that this work site was designed to afford accommodation to persons actually working there, not union organizers. In view of the unfortunate consequences sometimes associated with inter-union rivalry in the north, he urges the Board to either ban access to the work site altogether, or set out some general rules within which the various union representatives must conduct themselves.

11. We decline to do so. The respondent has already established certain basic ground rules which have been extended to both the Steelworkers and Mine Mill. We see no reason, at this stage, to depart from those ground rules, to affirm or deny their applicability to other unions, or to substitute such other rules as, in our view, might be more appropriate. We do not think that we should presume that the inter-union rivalry apparent in this case would necessarily result in a disruption of the respondent's ongoing business operations. On the other hand, we do note that the respondent is in the mining business. It is not running a hotel for union organizers. We see no reason why the respondent should subsidize the unions' organizing costs, and we expect that the applicants involved in this matter will reimburse the respondent for all reasonable costs associated with the pursuit of their rights under the Act. Further, we note as we did at the hearing, that the unions' right to be present at the work site is ultimately founded upon the employees' right to form or join a trade union. There is no right to engage in organizing activities during working hours or which spill over into working hours. Should there be any disruption of the employer's production process, we would be sympathetic to any employer action reasonably required to minimize such disruption.

### The Charges Against the Steelworkers

12. By letter dated May 6, 1983 counsel for Mine Mill raises a number of allegations against both the respondent and the Steelworkers. It is asserted, *inter alia*, that the employer advised the Steelworkers of Mine Mill's intention to try to organize its employees, and further, that the respondent supplied the Steelworkers with a list of its

employees. Both the Steelworkers and the respondent denied this latter allegation, and when pressed at the initial hearing in this matter, counsel for Mine Mill withdrew it. We are left, then, with the allegation that Steelworkers were advised that the Mine Mill was also intending to organize on the site, and the assertion that such advice constitutes improper support for the Steelworkers union of such nature as to raise the bar specified in section 13 of the Act. That section reads as follows:

The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

13. In our view, this submission is without foundation. The Steelworkers union is not a "sweetheart" or company-dominated organization to which the provisions of section 13 of the Act are ordinarily intended to apply. Here, the Steelworkers had been organizing for some time, had applied to the Board for an access order, and had settled that case on terms acceptable between the respondent and the Steelworkers union. Assuming, without finding, that the respondent advised the Steelworkers that another union was on the scene seeking access to the employees we do not think there is any basis for suggesting that the respondent has thereby improperly given support to the Steelworkers. Given the remote location and the potential limitations of transportation or accommodation, it is perfectly natural for the employer to advise the Steelworkers of the presence of a rival which might also claim the protection of section 11, and, in so doing, raise practical problems in respect of coordinating access. Indeed, it was precisely that difficulty which the respondent raised in its submissions before us. We do not consider notice to the Steelworkers of Mine Mill's presence to be a factor triggering section 13 of the Act.

14. At the continuation of the hearing in this matter, the Board will entertain the evidence and representations of the IUOE and the IBEW with respect to their entitlement to a craft bargaining unit, and in particular, whether they meet the so called second test (an established bargaining practice) established by section 6(3) of the Act. The Board notes the undertaking of counsel for the IUOE and IBEW to file the documentary evidence upon which they will rely with the Board prior to the hearing so that it will be available for inspection by the other parties.

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**1273-82-R International Brotherhood of Painters and Allied Trades - Local 1819 - Glaziers, Applicant, v. C T Windows Limited, Respondent.**

**Bargaining Unit - Certification - Construction Industry - Bargaining unit described in terms of glaziers' and glaziers' apprentices - Regulation governing glaziers containing exemption from prohibition in *Apprenticeship and Tradesmen's Qualification Act* against unqualified persons performing work - Board distinguishing *Irvcon Roofing* decision - Persons held to be employees in unit**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members I. M. Stamp and W. F. Rutherford.

**APPEARANCES:** *M. Zigler and John Kemp for the applicant; R. A. Werry for the respondent.*

**DECISION OF THE BOARD; May 19, 1983**

1. This is an application for certification pursuant to the construction industry provisions of the *Labour Relations Act*.

2. In a previous decision dated November 22, 1982, the Board directed this matter to be listed for hearing to deal with the relationship between the *Apprenticeship and Tradesmen's Qualification Act*, R.S.O. 1980 c. 24 and the bargaining unit and list of employees in the present case. The Board heard the representations of the parties on this matter. This case, however, goes far beyond the relationship between the *Labour Relations Act* and the *Apprenticeship and Tradesmen's Qualification Act*, but rather it goes to the very heart of the Board's typical bargaining unit descriptions in the construction industry, and the meaning which is to be attached those units.

3. We shall begin by recapping the issues which were dealt with in the Board's decision of November 22, 1982 referred to above. The applicant trade union in this matter is the Glaziers Local of the Painters Union. That local is part of a designated employee bargaining agency dated April 4, 1978 consisting of the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, and it bargains for the trade of glaziers pursuant to the provincial bargaining legislation in the construction industry. As a consequence the present application for certification was made pursuant to section 144(1) of the *Labour Relations Act*. The bargaining unit requested is a bargaining unit of all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, and in its previous decision the Board found that the appropriate unit was the unit requested by the applicant, together with the sectors other than the industrial, commercial and institutional sector for Board area 8.

4. The bargaining unit having been determined by the Board, the applicant at the first hearing in this matter, did not dispute the position taken by the respondent that none of the three persons in the employ of the respondent could be characterized individually as either journeymen glaziers or apprentice glaziers. Indeed, the position of the

respondent was that the three persons employed on the job site on the date of the making of the present application had no qualifications whatsoever as "glaziers". Only two of the three people had minor work experience doing the type of installation that was being performed and the third employee had no experience whatsoever. Notwithstanding this lack of experience, it is not disputed that the employees in question were doing "glaziers' work", that is, they were doing work which would normally fall within the scope of the glaziers provincial agreement.

5. In this context counsel for the respondent referred the Board to the *Irvcon Roofing and Sheet Metal (Pembroke) Ltd.* [1981] OLRB Rep. Nov. 1594 decision. Counsel argued that on the basis of that decision the Board should find that there are no glaziers nor glaziers' apprentices in the employ of the employer and that, therefore, there are no employees in the bargaining unit, and that the Board therefore has no jurisdiction to certify the applicant trade union.

6. In the *Irvcon* decision the Board had refused to include on a list of employees in the bargaining unit three employees who were performing sheet metal work, but who were neither certified tradesmen nor registered apprentices pursuant to the *Apprenticeship and Tradesmen's Qualification Act*. The basis for such a decision was section 10 of the *Apprenticeship and Tradesmen's Qualification Act* which prohibits persons other than certified tradesmen or registered apprentices from performing work in a certified trade. The Board, in effect, refused to recognize them as employees in the bargaining unit because they were clearly not lawfully employed in the performance of sheet metal work in view of the *Apprenticeship and Tradesmen's Qualification Act*.

7. In the present case, the glazier and metal mechanic, like the sheet metal worker, has been designated as a certified trade under the *Apprenticeship and Tradesmen's Qualification Act*. As noted above, the Board listed this matter for a second hearing to deal with the effect of the *Apprenticeship and Tradesmen's Qualification Act* on the present application. At the second hearing in this matter, the Board heard the evidence of Mr. Leslie F. Gordge, the General Manager, Client Group and Customer Service Skills Development Division, Operations Branch of the Ministry of Colleges and Universities. Mr. Gordge has held a number of positions with respect to apprenticeship and training since 1965 when the operation was still part of the Ministry of Labour. He explained that, as the Board noted in the *Irvcon* decision, the main prohibition of the *Apprenticeship and Tradesmen's Qualification Act* is set out in section 11(2). That section reads as follows:

"No person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), shall work or be employed in a certified trade unless he holds subsisting certificate of qualification in the certified trade."

There are two ways in which the operation of section 11(2) may be circumscribed. One way is for the directive pursuant to section 5(b) to exempt certain matters from the operation of section 11(2). The other way is for the specific regulation to contain a section exempting sections 9, 11(2) and 4 of the *Apprenticeship and Tradesmen's Qualification Act*. Mr. Gordge explained that the inclusion of such a provision in the regulation certifying a trade was at the root of the distinction between compulsory and

voluntary trades. Thus, in the present case, Ontario Regulation 39 which regulates the glazier and metal mechanics as a trade contains the following sections:

“7.-(1) Section 9 and subsections 11(2) and (4) of the Act do not apply to a person who works or is employed in the certified trade.

(2) Section 10 and subsection 11(3) of the Act do not apply to an employer in the certified trade.”

It is this provision in the regulation dealing with glaziers and metal mechanics which makes the trade a “voluntary trade”. That is to say it makes certification of tradesmen a voluntary matter and does not prohibit a person from working in the trade nor does it prohibit an employer from employing a person without the appropriate credentials from the Director of Apprenticeship. In contrast, the trade of sheet metal worker (the designation of the sheet metal worker, Ontario Revised Regulations of Ontario, O.R. 57) does not contain any provision equivalent to section 7 of Regulation 39 dealing with glaziers and, thus, sheet metal worker is a compulsory trade and section 11(2) of the Act applies to such a trade.

8. Mr. Gordge also explained that the Director, in certain circumstances would exempt very specific groups or classes of people covered by a mandatory compulsory regulation under section 5(b) of the Act. His evidence, however, was that that provision was not used to exempt a whole trade from section 11(2) of the *Apprenticeship Act* but rather specific elements of the designated trade. The example he gave in this regard was, for instance, electrical work in relation to the elevator construction industry. In relation to the construction industry as a whole, Mr. Gordge pointed out that there were only five compulsory trades to which section 11 of the *Apprenticeship and Tradesmen's Qualification Act* applied, namely, sheet metal worker, air-conditioning, refrigeration, plumbing and steamfitting, and electrical.

9. In view of the foregoing explanation of the operation of the regulations under the *Apprenticeship and Tradesmen's Qualification Act* it is clear in the present case that the concern of the Board in the *Irvcon* case does not apply in the present case. Simply put, neither that Act nor the regulations under that Act make it unlawful for any person whether qualified or not to work as a glazier or metal mechanic. It is thus clear, therefore, that the three employees could lawfully work as glaziers and the employer could lawfully employ them as glaziers in the present case.

10. Since the three employees could lawfully be employed as glaziers the question then remains, are they employees falling within the list of employees in a bargaining unit of glaziers and glaziers' apprentices? That is, to put the respondent's position at its broadest, how can persons who cannot be individually classified as glaziers or apprentices be included on a list of employees in a bargaining unit of glaziers and glazier's apprentices?

11. In this regard, counsel for the applicant pointed out that as a result of the Board's interpretation of section 144(1) of the Act in the *Clarence H. Graham Construction Limited* [1981] OLRB Rep. Sept. 1195 decision the applicant was constrained to apply for a bargaining unit of employees “who would be included in a



provincial agreement", thus, for instance, the applicant could not apply for a group of construction labourers or window installers and helpers, or indeed, an all employee engaged in construction as suggested by the respondent as the appropriate bargaining unit for the employees in this matter. Counsel for the applicant thus argues that since the applicant can only apply for a bargaining unit of glaziers and glaziers' apprentices section 144(1) cannot reasonably be interpreted to prevent the applicant from organizing unorganized employees in its trade.

12. The conundrum raised by the respondent, namely, how can employees who are not glaziers be on a list of employees in a bargaining unit of glaziers raises, quite specifically, the question of, what does the Board mean when it refers to a bargaining unit of "glaziers and glaziers' apprentices."?

13. Many of the construction bargaining units found to be appropriate in the construction industry are findings of an appropriate craft bargaining unit under section 6(3) of the Act. This was so even prior to specific amendments dealing with certification in the construction industry were first introduced into the Act in 1962. Subsequent to the introduction into the Act of specific provisions for construction certification, the Board developed a policy of referring to the employees in terms of the construction trade or trades at work on the job site. Thus, for instance, an industrial union operating in the construction industry and required to take all employees, receives a bargaining unit that is described not in terms of all employees of the employer, but rather in terms of the construction trades on the job site. (See, *A. K. Penner & Sons Ltd.* [1966] OLRB Rep. Oct. 493). Further, the craft structure of the construction industry has been noted in a number of decisions dealing with the Board's discretion to allow the "carve out" of a craft from a larger unit. Thus, in the *Kent Tile & Marble Co. Ltd.* case [1961] CLLC ¶16,204 the Board pointed out that the organization of the construction industry has traditionally been along craft basis and that great weight should be given to such interests. Following the *Kent Tile & Marble Co. Ltd.* case, the Board has allowed "carve outs" from larger units by the operating engineers, *Elwood Robinson Limited* [1967] OLRB Rep. June 261, and by the painters for a unit of plasterers in *Canwall Contractors Limited* [1975] OLRB Rep. July 532. What emerges therefore is a very clear reference to construction trades as the appropriate *generic* term when determining who is included in a bargaining unit. Notwithstanding this clear intention by the Board to describe bargaining units in terms of construction trades, there have been numerous examples of bargaining units in the construction industry where the Board was forced to resort to a formula which said "all employees engaged in ...". In this regard, the Board's recent case of *Ninco Construction Ltd.* [1982] OLRB Rep Nov. 1692 clearly sets out the Board's desire to use the various construction "trades" as the appropriate manner for determining the basic inclusion of people in the bargaining unit rather than referring to employees engaged in certain work.

14. The confusion which gives rise to the present case stems in large measure from the confusion of the two terms "construction trade" and the term "craft". As noted earlier, a large number of the construction unions are in fact craft unions. That is, they are capable of meeting the requirements set out in section 6(3) of the Act dealing with craft severance, and the entitlement to a craft unit. In cases involving section 6(3) the technical skills which distinguish the individual employees are part of the criteria which the Board uses to determine craft status and, in such cases training, qualifications, work experience of the individual employees become a critical element in a trade union's

attempt to prove its status under section 6(3) of the Act. In such cases, therefore, the fact, as in the present case, that the three employees involved as individuals were not trained glaziers could become a relevant consideration. The term "construction trade" is a much looser term. Thus, when the Board talks of certifying for a trade or trades that work on the job site the test which has traditionally been applied is to examine the work being performed by the employees. Thus, in the present case, the fact that the employees concerned are performing work which is normally performed by glaziers indicates that they were performing work falling within the trade of glaziers and, therefore, they are employees in the list of employees in the bargaining unit.

15. Having regard to the foregoing, the Board therefore finds that on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 20, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

16. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(emphasis added)

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 of the Board's decision dated November 22, 1982 in respect of glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

17. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all glaziers and glaziers' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

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**2639-82-R Service Employees' Union, Local 183, Applicant, v. Daynes Health Care Limited, Respondent.**

**Practice and Procedure - Sale of a Business - Transfer of nursing home operation not completed at time of hearing - Parties seeking Board's opinion on basis of facts as understood or expected to happen - Board refusing to give opinion prior to completion of transaction**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and F. W. Murray.

**APPEARANCES:** *Naomi Duguid, Don Burshaw II and Carolyn Shaughnessy for the applicant; K. W. Kort, E. Daynes and P. Powers for the respondent.*

**DECISION OF THE BOARD;** May 31, 1983

1. The name of the respondent is amended to read: "Daynes Health Care Limited".
2. This is an application under section 63 of the *Labour Relations Act* for a declaration that the respondent has or will shortly acquire the "business" of Balmoral Lodge Limited.
3. For reasons which will become apparent *infra*, the Board did not hear evidence in this matter. Counsel for both parties were content to solicit the Board's opinion on the application of section 63 on the basis of their representations as to what they understood or expected to be the facts surrounding the transaction between Balmoral and the respondent. It was common ground that there has been a sale or transfer of "something" between the two business entities. What remains at issue is whether that transaction can be characterized as a "transfer of a business" within the meaning of section 63 of the *Labour Relations Act*.
4. For some years, Balmoral Lodge Limited ("Balmoral") has operated a nursing home known as Balmoral Lodge at 293 London Street in the City of Peterborough. That nursing home is operated pursuant to a licence issued by the Ministry of Health under the authority of the *Nursing Homes Act*. The licence permits Balmoral to provide care for fifty-one residents. Balmoral's employees are represented by the applicant union.
5. Earl Daynes, the owner of the respondent company is in the nursing home business and operates several nursing homes around Ontario. He wants to expand into the Peterborough area. In pursuance of that objective, Mr. Daynes entered into certain agreements with Balmoral which were filed with the Board.
6. The principal document is an agreement of purchase and sale between Mr. Daynes and Balmoral wherein he purports to "purchase the licenced nursing home business and undertaking" of Balmoral. In the portion of the document headed "INTERPRETATIONS", one finds the following agreed definitions:

1. (a) "LICENCED NURSING HOME BUSINESS" means the 51 bed nursing home business presently located on and in the premises of a building located at 293 London St. Peterborough, Ontario in the



County of Peterborough and known municipally as the BALMORAL LODGE NURSING HOME NURSING HOME.

(b) "UNDERTAKING" means the right to operate the 51 bed licenced nursing home business, granted in the form of a licence issued under the authority of the Ontario Ministry of Health pursuant to the provisions of the Nursing Home Act, 1972 (Ontario).

The offer to purchase is made conditional upon the "written authorization from the Ontario Ministry of Health to move and incorporate the existing licenced nursing home business and undertaking into a proposed new facility now being arranged to be constructed on lands in the County of Peterborough". The agreement does not require the provision of any profit or loss statements or any other statements pertaining to Balmoral's business. In addition, Daynes agreed to purchase certain property owned by Balmoral at 1155 Water Street where a new nursing home building would be constructed.

7. Although the parties described the transaction as involving the acquisition of Balmoral's licence, and a substantial sum was paid to Balmoral in respect thereto, although it appears that, technically, Balmoral is surrendering its licence and the Ministry of Health is issuing a new one. The mechanics of this process and the business and public policy considerations involved in it were not put before the Board. As we have already noted, the circumstances were dealt with in submissions by counsel for Daynes and the union. Balmoral did not appear, nor did we have the benefit of evidence concerning the deliberations of the Ministry of Health. At the time the application was made the respondent had no licence to operate a nursing home business in Peterborough and was not doing so.

8. The purchase and sale document was amended three times. On June 2, 1982, Daynes was given further time to arrange satisfactory financing. On October 27, 1982, the parties agreed that Daynes would give back to Balmoral a "second mortgage on the land and buildings to be constructed, a second chattel mortgage, a second assignment of income, and a second assignment of nursing beds, all to be collateral to each other for the balance of the purchase price of land and business...". Balmoral also agreed to postpone its second mortgage on the land to any advances given by any institution for the purpose of financing the construction of the new building. The interest was to run on the second mortgage "from the point in time that physical transfer of patients residing at that time at Balmoral Lodge are moved to the new facility". Finally, on April 20, 1983, Daynes and Balmoral executed another document containing the following:

AND WHEREAS the Parties wish to amend the said Agreement of Purchase and Sale making it clear that the Purchaser was only purchasing the 51 bed nursing home licence, and no other assets of the vendor.

NOW THEREFORE WITNESSETH the mutual covenants and promises herein contained, the Parties hereto agree as follows:

1) The Purchaser is purchasing the 51 bed nursing home licence, issued under the authority of the Ontario Ministry of Health, and the Purchaser further agrees to transfer the 51 patients from Balmoral

Lodge Nursing Home, which are covered by this licence, to a new building at 1155 Water Street, in the City of Peterborough, in the County of Peterborough, and the Province of Ontario when the Ministry of Health approves the transfer of licence and patients.

It will be observed that this document was executed after the filing of the present application for a declaration that the respondent was a successor employer within the meaning of section 63 of the *Labour Relations Act*.

9. In accordance with the agreement of purchase and sale, the land on Water Street was acquired from Balmoral on or about July 15, 1982, and thereafter, Daynes began construction of an entirely new facility which was expected to be ready to receive the fifty-one Balmoral residents on or shortly after the "acquisition of Balmoral's licence" which was to be "transferred" in accordance with the agreement on June 30, 1983. In the meantime, thirty-three of the Balmoral residents remain at Balmoral Lodge while another eighteen have been housed temporarily in a nearby Extendicare facility. It is expected that forty-eight of the fifty-one residents will eventually be transferred to the new building on Water Street which is two or three miles from Balmoral's location.

10. The new facility will have a capacity of sixty-five beds - that is, in excess of the number of residents permitted by the licence acquired from Balmoral. It is expected that the Ministry of Health will issue a licence for an additional twenty-five residents for a total permitted capacity of seventy-six beds. To accommodate the extra eleven places will require some further construction and renovation which is expected to be completed by the end of August. Mr. Daynes plans to transfer approximately seven employees from his existing business operations to the new nursing home on Water Street which will be known as Riverview Nursing Home. If the respondent were found to be a successor employer, some of these employees might fall within the applicant's bargaining unit. It is intended to fill the rest of the employee complement by hiring from a list of some four hundred applicants for jobs at the Riverview Home. Those individuals would be selected on the basis of their relative experience, skills, and ability. A number of individuals currently working at Balmoral are among these applicants.

11. After June 30th, Balmoral will no longer be able to operate a nursing home. Its employees have been given notice of their termination in accordance with the requirements of the *Employment Standards Act*. However, it is not clear what will happen to Balmoral since it is possible that it will remain open, or subsequently reopen in some other capacity providing accommodation for residents of a somewhat different character from that required to be provided under the *Nursing Homes Act*.

12. The union and the respondent both acknowledge that, in some sense, this application may be premature because the transaction has not yet closed, the licence to run the Riverview Nursing Home has not been formally acquired, the employee complement has not been settled and none of the residents have actually been transferred. However, both counsel urge the Board to express a preliminary opinion on the question of whether, if the transaction unfolds as it is expected to do, it would amount to a transfer of a business within the meaning of section 63 of the *Labour Relations Act*. The union takes the position that it would. The respondent asserts the contrary. Both parties point out that the Board's opinion would be helpful to them in planning their

affairs. From the union's perspective, it has a number of members who face the prospect of termination in June and who are anxious to know whether their collective agreement rights and hence claim to jobs at Riverview will be preserved. The employer is anxious to ascertain the parameters within which he can establish the employee complement and the terms and conditions of employment of the persons hired to work at Riverview. There is no indication that the employer would abort or alter the form of the transaction depending upon the Board's decision, but it is obviously, and understandably, interested in avoiding any potential liability associated with the legal uncertainty.

13. We are not unsympathetic to the parties' concerns, but we have concluded that we should not express any opinion or make any determination about the application of section 63 until the transactions said to constitute a transfer of a business have been completed. Any desire to provide guidance to the labour relations community in a difficult area of the law must be tempered by a recognition that preliminary opinions based on hypothetical facts could create as much mischief as they resolve, if not more. Not only would such opinions encourage a rescission or restructuring of transactions to which section 63 might otherwise apply but, in addition, there could be litigation about the effect of the opinion itself and whether the transaction was actually consummated in the form upon which the Board's opinion was based. Since close cases will often turn on subtle shadings of fact, in our view, it would be unwise to render opinions on what will inevitably be less than complete information. In today's volatile business climate there is a real likelihood that various components of "the deal" will change (for example, to accommodate financing or licencing requirements) between its initial conception and its completion, and we are by no means convinced that the injection of a preliminary Board opinion at one stage or another in this process would really facilitate the promotion of orderly collective bargaining or the interests which section 63 was designed to protect. Finally, we are constrained to note that section 63 is not the only provision of the Act which occasionally gives rise to interpretive difficulties. The same could be said of the duty to bargain in good faith, the so-called statutory freeze (see section 79), and certain of the unfair labour practice provisions. It is an unfortunate fact that, like other areas of the law, the law regulating employer-employee relations has become increasingly complex and in many cases there is room for argument about how the law should be interpreted or applied. However, we do not think that the answer to this complexity or to the business planning problems faced by the labour relations community lies in this Board giving preliminary opinions on hypothetical fact situations.

14. For the foregoing reasons, we have determined that this application must be dismissed as premature. Such dismissal, of course, is without prejudice to either party bringing a fresh application at an appropriate time in the future.

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**2147-82-R** Hotel Employees and Restaurant Employees Union, Local 75, Applicant, v. **Food Corp. Limited** (Urban Restaurant Division, Commerce Court, Respondent).

Membership Evidence - Successor Status - Trade Union Status - Merger of local unions - Whether employees confused as to entity they were joining - Whether substantive changes resulting in formation of new union - Board not disregarding membership evidence and results of pre-hearing vote taken

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members W. H. Wightman and P. J. O'Keeffe.

**DECISION OF THE BOARD;** May 13, 1983

1. By letter dated March 23, 1983, the solicitors for Food Corp. Limited advised the Board that by reason of a corporate reorganization, Food Corp. Limited has become the employer of the employees to which this application applies. Accordingly, the style of cause of this application is amended to substitute Food Corp. Limited (Urban Restaurant Division, Commerce Court) as the correct name of the respondent herein. For reasons set out below, the name of the applicant is amended to read: Hotel Employees and Restaurant Employees Union, Local 75.

2. This is an application for certification in which the applicant union requested the taking of a pre-hearing representation vote. In accordance with its usual practice, the Board appointed a Labour Relations Officer to meet with the parties to endeavour to settle the voting constituency and the voters' list. The parties were in substantial agreement with respect to the description of the bargaining unit and the voting constituency, although they were not in agreement about the status of "sous chefs" or "cashiers". The union took the position that these individuals were "employees", sharing a community of interest with their fellows, and, as such, should be entitled to vote and to be included in the bargaining unit. The employer took a contrary position.

3. By decision dated February 1, 1983, the Board directed that a Labour Relations Officer inquire into this matter, but also directed the taking of a pre-hearing representation vote with the proviso that the individuals whose status was in dispute should cast segregated ballots. The voting constituency was described as follows:

All employees of the respondent's Urban Restaurant Division working at Commerce Court (Wellington's Dining Room & Wellington's On The Court Lounge, Jolly Chef, Teller's Cage, Cafe Galleria, P. J.'s West & P. J.'s East) in the City of Toronto, save and except supervisors, chefs, *sous chefs*, persons above the rank of supervisor, chef and sous chef, management trainees, entertainers, office, sales, accounting and support staff, *cashiers* and students employed during the school vacation period.

4. The vote was held on the employer's premises on February 11, 1983, and on the agreement of the parties the ballots (other than those segregated) were counted. The voting results indicate that regardless of the eligibility of the disputed individuals to vote



and the way in which they might have cast their ballot, more than fifty per cent of the respondent's employees have voted in favour of trade union representation. In other words, even if all of the individuals casting segregated ballots were included in the bargaining unit and voted against the union, it would still "win" the vote. Nevertheless (again in accordance with its usual practice), the Board put the matter on for a hearing to entertain the parties' representations with respect to that vote. In the meantime, as we have already noted, the legal identity of the employer had changed. It is not suggested that this, in itself, affects the issues in this case.

5. In order to appreciate the argument raised by the respondent employer, it is necessary to briefly sketch in some of the organizational history of the applicant union. As will become apparent, *infra*, the respondent is not the only entity which has been the subject of some reorganization. The facts are not in dispute.

6. On September 2, 1982, Local 75 of the Hotel, Restaurant & Cafeteria Employees Union (the traditional name of Local 75), affiliated with the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO-CLC (the traditional name of the parent union) filed an application for certification respecting the employees of "Wellington's Restaurant" - then run by Cara Operations Limited. Wellington's is one of a number of food and beverage establishments in the "Commerce Court" commercial complex in Toronto. On October 26, 1982, the applicant sought leave to withdraw this application, and by decision of the Board dated November 3, 1982, the application was dismissed. The applicant then set about organizing the other food service employees working in the food service outlets in Commerce Court. These employees subsequently became the subject of the present certification application.

7. The Hotel, Restaurant & Cafeteria Employees Union, Local 75 has established its status as a union within the meaning of section 1(1)(p) of the *Labour Relations Act*. So has its parent International Union. The respondent herein does not question the status of either union entity.

8. At its 1981 international convention, the parent Hotel and Restaurant Employees and Bartenders International Union, changed its name to the "Hotel Employees and Restaurant Employees International Union". Such change in name, of course, does not impair its status as a trade union within the meaning of the Act. More important for this case, however, are the changes to "Local 75".

9. In order to eliminate duplicate expenses and administration costs, and generally to improve the efficiency of service to its membership, the parent International Union decided to merge some of the smaller local unions scattered around Ontario into the Local 75 - the Toronto Local. The merger was effected under Article 5, section 19 of the International Union constitution, which empowers the general president to merge local unions with the approval of the general executive board. This power was exercised by instrument dated October 25, 1982, entitled "Declaration and Order for Merger" and under which (to put the matter colloquially) Hotel and Restaurant Employees and Bartenders Union, Local 756 (Hamilton, St. Catharines) and Hotel, Motel and Restaurant Employees Union, Local 893 (Atikokan) were "folded into" Toronto Local 75. In addition, under this document, new bylaws were established which changed the name of the applicant to Hotel Employees and Restaurant Employees Union, Local 75. This

amendment brought the name of the Toronto Local 75 more into line with the new name of the International. Subsequently, Hotel and Restaurant Employees Union, Local 743 (Windsor), Beverage Dispensers' Union, Local 412 (Sault Ste. Marie), and Hotel, Motel and Restaurant Employees and Beverage Dispensers Union, Local 757 (Thunder Bay) were also "folded into" Local the same manner. All of these formerly independent local unions referred to themselves in a slightly different way although all of the locals were affiliated to the same parent union and, as the local designations all indicate, all of the locals consist of hotel and restaurant employees.

10. The above-noted transactions changed the name, size, and responsibilities of Toronto Local 75, but there was no substantive or structural change. All of the officers of the Local remain the same. The business agents remain the same. The address remains the same. The bank account remains the same. Collective bargaining activity and the administration of existing collective agreements has gone on just as before. Local 75 has a number of subsisting collective bargaining relationships with employers in the Toronto area, and in respect of those relationships, Local 75 has continued to perform its role and fulfill its responsibilities as the employees' bargaining agent. No employer has raised any question about this, and it is acknowledged by the respondent that even if Local 75 under its "old name" and Local 75 under its "new name" were to be treated as two entirely separate entities (rather than the same entity with a slightly different name), both would clearly be "trade unions" within the meaning of section 1(1)(p) of the *Labour Relations Act*. It is also agreed that there is no other trade union operating in Ontario or in Toronto which could be confused with Local 75 under either its old or new name. No other union has sought to organize the respondent's employees. The only union on the scene is Local 75.

11. The problem in this case arises from the various ways in which the applicant refers to itself on the various documents associated with this proceeding. The application itself, made on January 18, 1983, was filed mistakenly under the name "Hotel, Restaurant & Cafeteria Employees Union, Local 75" - the "old name" for the Toronto Local and the name in which the earlier application had been filed several months before. The old application was referred to as a precedent when the union filed the present application, and, in consequence, the old name was mechanically but mistakenly inserted in the style of cause. The membership documents filed in support of the application are of two different kinds. One group of cards is headed "APPLICATION FOR MEMBERSHIP in the HOTEL AND RESTAURANT EMPLOYEES' AND BARTENDERS' INTERNATIONAL UNION affiliated with AFL - CIO CANADIAN LABOUR CONGRESS"; and indicates a place where the employee makes application to become a member of HOTEL AND RESTAURANT EMPLOYEES' AND BARTENDERS' INTERNATIONAL UNION Local No. 75. These cards, more or less conform to the old name for the parent and local union, except that the latter has more recently included a reference to Cafeteria Employees. By signing such card, the employee is joining Local 75 of a hotel and restaurant employees' union affiliated to an international parent union. The other group of cards has a preamble APPLICATION FOR MEMBERSHIP in the HOTEL EMPLOYEES', RESTAURANT EMPLOYEES', INTERNATIONAL UNION and there follows a space wherein the individual employee makes application to become a member of HOTEL, RESTAURANT AND CAFETERIA EMPLOYEES' UNION LOCAL 75. In the case of these cards, the preamble reflects the new name of the International, but the traditional name of Local 75. Again, however, it is obvious that the employee is joining

Local 75 of the hotel and restaurant employees' union which has an affiliation with its American parent union. The literature supporting the organizing campaign also refers to the union which employees are invited to join as the "Hotel, Restaurant and Cafeteria Employees' Union - Local 75 of Hotel and Restaurant Employees' and Bartenders' International Union". And there is reference to "Hotel Employees' and Restaurant Employees' International UnionAFL-CIO" too. Finally, in accordance with the way in which the applicant initially styled this proceeding, employees were asked to vote upon whether or not they wish to be represented by the Hotel, Restaurant & Cafeteria Employees Union, Local 75.

12. Counsel for the respondent contends that the mergers referred to above have the effect of creating a new organization which, although a trade union, is a *different* trade union from the applicant. Counsel submits, therefore, that the application should be dismissed. In the alternative, the respondent argues that there would be confusion in the minds of the employees as to which union they were joining, such that the Board should disregard their membership evidence and the results of the representation vote.

13. The applicant maintains that neither the merger of certain other locals into Local 75 nor the change in its name affects the essential identity of Local 75. It is not a new entity because it is now bigger and has a new name. Counsel asserts that the instant application was made in the old name because of a simple and perhaps natural mistake, given that the applicant merely followed the precedent of its previous application a few months before. Counsel notes that there is not the slightest evidence of any *actual* confusion on the part of employees, nor has any employee come forward to impugn the representation vote on this basis. The union is the same body it always was, even though it may have been referred to, at various times, in slightly different ways. At all material times there has only been one union on the scene soliciting employee support. There is no other union present with which it could be confused. It has always been evident that the applicant is Local Union No. 75 of an International Union representing hotel and restaurant and related employees. Counsel submits that it would be unduly technical and prejudicial to the rights of the majority of employees as indicated in the representation vote, if the Board were to disregard the results of that vote simply because the material before the Board reflects the slightly different ways in which the applicant is actually referred to.

14. In an application for certification the Board places considerable reliance on a union's documentary evidence of membership - even though here we also have the confirmatory evidence of a representation vote. Any arguable irregularities or deficiencies in that documentary evidence will merely complicate the processing of a certification application and contribute to cost and delay. Such problems are usually minor, and totally avoidable with a modicum of care on the part of an applicant union.

15. The Board acknowledges that the union's organization campaign in this case coincided with certain structural and nominal changes to Hotel, Restaurant & Cafeteria Employees Union, Local 75; however, even so, it is evident that the union has been rather lax and sloppy in the conduct of its campaign through the use of membership cards and literature which do not refer precisely to the local union's correct name. Such laxity should not be encouraged. On the other hand, the evidence before us demonstrates beyond doubt that, despite certain variations in nomenclature, there has been no



substantive change in the legal identity of Local 75, which was and continues to be a trade union within the meaning of section 1(1)(p) of the Act; nor is there any real basis for confusion as to what the employees were joining or voting for. In our view, it would be unduly technical (as well as inequitable) if we were to disregard the desires of the employees for trade union representation as expressed on both the membership cards and the secret ballot vote. This is not a case, for example, where individuals could have been confused about whether they were joining one local or another, or a local versus a parent body. In such circumstances, different considerations might well apply. Here, however, there has only been one union on the scene from the outset and we do not think there is any reasonable basis for concluding that the employees did not know what they were voting for. We note, once again, that no employee has made any such assertion.

16. On the basis of the evidence before the Board, it is clear that whether or not the disputed *sous chefs* and *cashiers* are included in the bargaining unit, more than thirty-five per cent of the employees in the bargaining unit, at the time the application was made, were members of the union within the meaning of section 1(1)(l) of the Act. It is also evident, having regard to the results of the representation vote, that whether or not the *sous chefs* and *cashiers* are included in the unit, more than fifty per cent of the ballots cast were in favour of trade union representation. Any dispute as to the composition of the bargaining unit in this case cannot affect the union's right to certification. Accordingly, the Board, pursuant to section 6(2) of the Act, and pending the final resolution of the composition of the bargaining unit, certifies Hotel Employees and Restaurant Employees Union, Local 75 as the bargaining agent for a bargaining unit described as follows:

All employees of the respondent's Urban Restaurant Division working at Commerce Court (Wellington's Dining Room & Wellington's On The Court Lounge, Jolly Chef, Teller's Cage, Cafe Galleria, P. J.'s West & P. J.'s East) in the City of Toronto, save and except supervisors, chefs, sous chefs, persons above the rank of supervisor, chef and *sous chef*, management trainees, entertainers, office, sales, accounting and support staff, *cashiers* and students employed during the school vacation period.

17. A formal certificate must await the final determination of the appropriate bargaining unit.

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**1255-82-U** Mechanical Contractors Association Ontario, Complainant, v. **Honeywell Controls Ltd.**, Johnson Controls Ltd., United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, and United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Respondents, v. Canadian Pneumatic Control Contractors Association, Intervener.

**Construction Industry – Unfair Labour Practice – Local union continuing to supply employees to respondent employers during lawful province-wide strike – Whether pneumatic control work within ICI sector – Whether respondent employers covered by province-wide agreement – Board not creating additional sector – Whether separate bargaining of pneumatic control agreement contrary to s.146(2)**

**BEFORE:** George W. Adams, Q.C., Chairman, and Board Members W. Gibson and M. A. Ross.

**APPEARANCES:** *Mr. G. Grossman, D. Lewis and W.T.A. Nicholls for the applicant; Paul S. Jarvis and John Mack for Honeywell Controls Ltd.; Richard Nixon and Steven Rosenhek for Johnson Controls Ltd.; and L. C. Arnold and W. Howard for the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; and Brian P. Smeenck, C. Hepburn and G. Ames for the intervener.*

**DECISION OF THE BOARD;** May 25, 1983

1. This is a complaint filed pursuant to section 89 of the *Labour Relations Act* alleging a violation of section 146(2) of the Act. In brief, section 146(2) renders any collective agreement or other arrangement other than a provincial agreement null and void in the industrial, commercial and institutional sector of the construction industry where designations of employee and employer bargaining agencies are in effect pursuant to section 139 of the Act. The applicant is a designated employer bargaining agency and the designation issued April 3rd, 1978 provides:

The designation of The Mechanical Trade Bargaining Committee of the Mechanical Contractors Association of Ontario dated March 21, 1978 is hereby revoked and the following designation is substituted therefore:

Pursuant to clause *b* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c.232, as amended, I hereby designate the Mechanical Contractors Association of Ontario as the employer bargaining agency to represent in bargaining all employers whose employees are represented by the following affiliated bargaining agents:

1. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and

Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; or

2. the following Local Unions: 46, 67, 71, 221, 320, 463, 508, 527, 552, 593, 599, 628, 663, 666, 800, and 819; or
3. any other Local of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada which in the future may be chartered to represent Journeymen and Apprentice Plumbers and Pipefitters,

(which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid, all employers bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

This designation is subject to the condition that the Mechanical Contractors Association of Ontario file with my office a copy of the appropriate changes in its constitution to accommodate The Industrial Contractors Association's representation on the Mechanical Contractors Association of Ontario.

2. Similarly, the respondent's United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (hereinafter referred to as "Local 46") and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (hereinafter referred to as "the International Association") are governed by the terms of a designation dated April 12th, 1978 which provides:

The designation of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada dated March 21, 1978, is amended by substituting the word "employees" for



the word “employers” in the thirty-third line thereof; so that the designation reads as follows:

Pursuant to clause *a* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c.232, as amended, I hereby designate the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada as the employee bargaining agency to represent in bargaining all Journeymen and Apprentice Plumbers and Pipefitters, represented by the following affiliated bargaining agents:

1. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; or
2. the following Local Unions: 46, 67, 71, 221, 320, 463, 508, 527, 552, 593, 599, 628, 663, 666, 800, and 819; or
3. any other Local of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada which in the future may be chartered to represent Journeymen and Apprentice Plumbers and Pipefitters,

(which Council and Unions are hereinafter collectively referred to as “the Unions”), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements in which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

3. Sections 146 and 148 of the Act provide for the integrity of the designations in the following manner:

146.-(1) An employee bargaining agency and an employer

bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1), is null and void.

(3) Every provincial agreement shall provide for the expiry of the agreement on the 30th day of April calculated biennially from the 30th day of April, 1978.

148.-(1) Where an employee bargaining agency desires to call or authorize a lawful strike, all of the affiliated bargaining agents it represents shall call or authorize the strike in respect of all the employees represented by all affiliated bargaining agents affected thereby in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), and no affiliated bargaining agent shall call or authorize a strike of such employees except in accordance with this subsection.

(2) Where an employer bargaining agency desires to call or authorize a lawful lock-out, all employers it represents shall call or authorize the lock-out in respect of all employees employed by such employers and represented by all the affiliated bargaining agents affected thereby in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) and no employer shall lock out such employees except in accordance with this subsection.

4. The effect of this legal arrangement is to create single trade province-wide bargaining in the industrial, commercial and institutional sector of the construction industry referred to in section 117(e) of the Act. Section 117(e) provides:

117. In this section and in sections 118 to 136,

(e) "sector" means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and water-mains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector.

5. The applicant on May 25th, 1982 was engaged in collective bargaining for a province-wide industrial, commercial and institutional agreement with its designated

employee bargaining agent counterpart which includes the two respondent trade unions. The applicant submits that Honeywell Controls Ltd. (hereinafter referred to as "Honeywell") and Johnson Controls Ltd. (hereinafter referred to as "Johnson") work within the industrial, commercial and institutional sector employing members of the two respondent trade unions and that, accordingly, Honeywell and Johnson are subject to its designation and were to be covered by the terms of any provincial collective agreement negotiated by it. On or about May 25th, 1982, a strike was commenced by the designated employee bargaining agent. Notwithstanding the strike, the respondent trade unions continued to supply employees to the respondents Johnson and Honeywell. The applicant submits that in doing so the respondent trade unions violated sections 146(2) and 148(1) of the Act. The applicant further submits that in continuing to employ such employees and in continuing to operate their businesses, Johnson and Honeywell acted contrary to section 146(2) and 148(1) of the Act. Examples of projects on which Johnson continued to operate during the course of the strike included the computer centre for the Royal Bank at 325 Front Street in Toronto and the IBM headquarters on Victoria Park Avenue in Toronto. Examples of Honeywell projects worked on during the strike included Ship Corporation at 4 Robert Speck Parkway in Mississauga and General Foods at Moatfield Road in Don Mills.

6. The respondent employers and trade unions admit that this work was carried on but submit that they are not in respect of pneumatic control work subject to the above designation orders and, further, that the work was carried out pursuant to a national agreement between the Canadian Pneumatic Control Contractors Association and the International Association (hereinafter referred to as the "Pneumatic Control agreement"). This agreement "picks up" the rates of pay of any local union agreement prevailing in a work area (i.e. in the industrial, commercial and institutional sector in Ontario this would be the provincial agreement) but goes on to deal with many other terms and conditions of employment including crew size, the supply of men, and use of personal cars. The provincial agreement either conflicts or does not deal with these three areas of working conditions. The expiration of the Pneumatic Control agreement in effect at the time this matter arose was December 31st, 1982. The applicant submits that this agreement is contrary to section 146(2) and seeks a declaration to this effect.

7. The trade or work jurisdiction of the International Association is set out in the Pneumatic Control agreement at paragraph 13 in the following terms:

13. This Agreement covers the rates of pay, hours and working conditions of all workmen employed by the Employer doing plumbing and pipe fitting as related to the installation, service, and maintenance of all pneumatic control systems, and component parts thereof, including calibration, commissioning and start-ups, fabrication, assembling, erection, installation, dismantling, recording, adjusting, altering, and servicing of said pneumatic control systems, and the handling, unloading, distributing, reloading, tying on, and hoisting of all piping materials, and appurtenances and equipment used in connection with said pneumatic control systems by any method, including all hangers and supports of every description, and all other work included in the trade jurisdiction claims of the United Association. This Agreement also covers workmen engaged in servicing, field repair, and maintenance of all phases of process



control systems. No other classification of workmen shall be created or introduced which will have the effect of circumventing the provisions of this Agreement.

Environmental control systems within buildings or process control systems used in industry are controlled by either air pressure conveyed by plastic, galvanized or copper piping or by electrical signals conveyed by wiring. From the evidence of Donald S. McLeod of Comstock International Limited and Robert J. McLeod of McLeod & Sons Ltd. it is clear that in the past pneumatic control work has been considered part of the mechanical package. A mechanical contractor would include in his bid the pneumatic control work and then in turn might subcontract this work to one of the recognized control contractors. The control contractors are clearly more specialized than a mechanical contractor in this line of work in that the control contractors manufacture, instal and service their own pneumatic control systems. However, while the greatest percentage of pneumatic control installations is performed by the pneumatic control contractors in commercial and institutional buildings, mechanical contractors do instal these systems with their own forces on occasion and may instal upwards of 50% of the control systems in industrial applications. The evidence reveals that in recent years pneumatic control contractors have increasingly been making bids on their own behalf directly to owners or general contractors and thereby depriving the mechanical contractors of the mark-up they would normally take in contracting out this aspect of a mechanical package.

8. Mr. Eryl Roberts, Labour Relations Manager of the Electrical Contractors Association of Toronto and Secretary for the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, testified with respect to electrical control systems and the coverage of the electricians' provincial agreement with respect to this kind of work. He testified that Johnson and Honeywell employed members of I.B.E.W. Local 353; that they paid into the industry fund pursuant to the electrical provincial agreement; and that they were bound by the provincial agreement with respect to the installation of electrical control systems. The evidence tendered on behalf of the respondent companies confirms that they are bound by the electrical provincial agreement with respect to electrical control installation work in the industrial, commercial and institutional sector of the province.

9. On the other hand, the separate treatment of pneumatic control work by the International Association dates back to 1944. Until the late 60's or early 70's Canadian pneumatic control work was governed by the terms of "a national agreement" negotiated by a United States and Canada labour relations committee made up of representatives of U.S. control companies and their Canadian subsidiaries. Historically, therefore, one agreement applied to the United States and Canada. However, the Canadian Pneumatic Control Contractors Association (hereinafter referred to as "the Association") came to be formed and the International Association consented to its Canadian officers negotiating with this new entity. Accordingly, since at least 1974 there has been a national pneumatic control contract applicable only to Canada. Not all pneumatic control contractors, however, belong to the Association although they are governed by an equivalent agreement made with the International Association in any event. The evidence reveals that certain of the pneumatic control contractors have, in the past, intervened in accreditation proceedings where a mechanical contractors' association was seeking

accreditation and obtained the exclusion of the pneumatic control contractors from the issued accreditation orders. Representative of these interventions would be the Johnson Controls' intervention in Board File No. 2776-72-R involving an application by the Mechanical Contractors' Association of London in respect of Local Union 593 of the International Association. The Johnson Controls' intervention in that case pleaded that it had no collective agreement with Local 593 and that it was a member of the Pneumatic Control Systems' Council "which Council entered into a collective agreement with the United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of the United States and Canada". The evidence further reveals that specific notice of the designation proceedings in 1978 was not given to the Canadian Pneumatic Control Contractors Association or to individual pneumatic control contractors. On the other hand, we are not prepared to find that the Council or its members were unaware of the designation proceedings and it is clear that they did not intervene to seek an exclusion from the designation orders. Indeed, they accept that they are bound by the electrical designation. Finally, the evidence indicates that the pneumatic control contractors have paid into the mechanical trade industry fund since the advent of provincial bargaining and that they have been kept abreast of provincial bargaining through various mailings. Indeed, officials of certain of the companies have attended bargaining policy meetings although it is the position of the pneumatic control contractors that such attendance was aimed only at receiving information about the direction of provincial bargaining, recognizing that their national agreement picks up the rates set out in the provincial agreement.

10. The applicant submits that the work clearly falls within the industrial, commercial and institutional sector and that the respondent companies are just as clearly bound by both the designation order of the applicant and the provincial agreement. Counsel submitted that the Board should view the sectors set out in the Act as exhaustive and, alternatively, argued that there was no justification to create a different or additional sector in the facts at hand. Counsel stressed that the respondent companies were working side by side with mechanical contractors; that they often performed work pursuant to a subcontract for mechanical contractors; and that they considered themselves bound by the electrical provincial collective agreement for the electrical control work. Counsel submitted that at best pneumatic control work was a speciality within the plumbing and pipe fitting craft and pointed to the evidence of joint training programs with respect to this work between the applicant and local trade unions. It was particularly emphasized that the control contractors were not the only contractors performing pneumatic control work. Counsel disputed that the applicant was estopped from bringing this complaint. He argued that the existence of the Pneumatic Control agreement was never brought to the applicant's attention; it made no representation to the respondents on which they could have relied; and that, in any event, estoppel could not be relied upon to defend against the application of a public statute. On behalf of the Canadian Pneumatic Control Contractors Association it was submitted that the provincial agreement does not apply to the work in question and, in the alternative, the Board ought to refuse the remedy having regard to the long history of separate and distinct bargaining engaged in by the Association together with the failure of the applicant formally to negotiate on behalf of pneumatic contractors. Counsel emphasized that single trade province-wide bargaining was intended only to consolidate pre-existing bargaining patterns on a province-wide basis. With this purpose in mind, it was his submission that the long history of separate bargaining by pneumatic control contractors with the International Association suggested

that there was no intent to designate the applicant to bargain on behalf of pneumatic control contractors. It was pointed out that pneumatic control contractors were not given notice of the designation proceedings and this fact either precluded a request for exclusion by the Association or indicated an intent that the Association was not affected by the proceedings. Counsel submitted in the alternative that the same facts ought to encourage the Board to exercise its discretion and decline to issue the requested relief. Counsel on behalf of Johnson Controls contended that the designation order could not affect pneumatic control contractors because they were not given notice of the proceedings and, alternatively, that the designation order was a nullity in that there was no evidence that certain conditions subsequent had been complied with. Counsel stressed that the pneumatic control agreement was not a sham agreement or designed to circumvent or undermine the provincial agreement. Counsel on behalf of Honeywell stressed that at the very least the national agreement remained effective outside the ICI sector and that if pneumatic control contractors were to be bound by the provincial agreement the Board ought to fashion an order which maintained the status quo until the next round of provincial bargaining. However, the primary thrust of his argument was in support of the representations made by the other respondents with a particular plea that the Board decline to make the direction requested. On behalf of the respondent trade unions counsel contended that the Pneumatic Control agreement was negotiated by the International Association and local unions were bound by this constitutional arrangement. Counsel submitted that the Board ought to have regard to the distinctive work characteristics of pneumatic control work and create another sector which would embrace the work and avoid the ambit of the provincial agreement in question. As did other counsel, counsel for the trade unions stressed that provincial bargaining was not designed to alter historical bargaining patterns and that at the very least the Board ought to use its discretion to delay the effect of any declaration to the expiration of the current provincial collective agreement.

11. On the evidence before us, we are satisfied that the respondent companies perform pneumatic control installation work within the industrial, commercial and institutional sector of the construction industry. A long history of negotiating national agreements does not and cannot alter this fact. We are further satisfied the work in question is a specialization of the plumbing and pipe fitting trade and the contractors either individually or through their association have collective bargaining relationships with the International Association which is subject to and constrained by the applicant's designation as employer bargaining agent. Accordingly, we are satisfied that the respondent companies are equally subject to the applicant's designation as bargaining agent and that the designation is not defective in any way. It is not for this Board to review the procedure by which the designations were originally made. Some of the respondent companies argued the need for another sector but no such case was made out. Electrical control work has been accommodated by the electrical provincial agreement. There are also many examples under other provincial agreements of parties according distinctive treatment to particular lines of work by appendices. We also point out that any employer bargaining agency owes a duty of fair representation to its constituent employers and the applicant will have to be sensitive to possible conflicts of interest referred to by some of the witnesses in this case. However, pursuant to the Board's remedial authority granted by section 89 the declaration contained above in this paragraph and a related declaration that any pneumatic control agreement insofar as it pertains to the industrial, commercial and institutional sector is null and void shall not be



effective until the expiration of the current provincial agreement unless the applicant is willing to adopt the salient terms of the pneumatic control agreement as an appendix to the provincial agreement for the duration of the current provincial agreement. This condition is based on the considerable history of pneumatic control bargaining and the way in which the matter arose. In our view the parties should be given a meaningful opportunity to deal with the various issues involved in integrating pneumatic control work into the provincial agreement. We further provide that these conditions are in turn conditioned upon the respondent companies continuing to pay into the industry fund set out in the provincial agreement.

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**1248-82-U** Teamsters, Local 419, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Complainant, v. **K Mart Canada Limited**, Respondent.

Arbitration - Discharge for Union Activity - Employer - Interference in Trade Unions - Remedies - Unfair Labour Practice - Employer increasing use of temporary workers attempt to undermine union - Union filing grievance alleging temporary workers covered by agreement - Whether subsequent discharges and reduction in hours unlawful - Board finding respondent employer of employees supplied by employment agencies - Board not deferring to arbitration - Union not estopped from claiming relief

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members C. G. Bourne and C. A. Ballentine.

**APPEARANCES:** Douglas J. Wray and Gene O'Driscoll for the complainant; Robert A. MacDermid and C. A. Cumiskey for the respondent.

**DECISION OF THE BOARD;** May 1, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant (also referred to in this decision as the "union") alleges that the grievors have been dealt with by the respondent (also referred to as "K Mart") contrary to the provisions of sections 64, 66, 67, 70, 72, 75, and 80(1) of the Act.

2. The essence of the complaint is the union's allegation that the respondent contravened the Act by terminating or reducing the hours of the grievors, who are persons supplied to the respondent by various personnel agencies, as a result of a grievance filed by the union in which it sought declaratory relief and compensation on the basis of its assertion that the persons in question are employees of the respondent covered by the collective agreement in force between the respondent and the union.

3. At the commencement of the hearing of this complaint, counsel for the respondent asked the Board "to exercise its discretion to defer the matter to arbitration". He also raised the issue of whether notice should be given to the personnel agencies who supplied the persons in question to the respondent. After hearing and considering the

submissions of the parties concerning those preliminary matters, the Board made the following oral ruling, which is hereby confirmed:

"The Board is of the view that this is not an appropriate case in which to defer to arbitration. If the subject matter of the complaint were merely the issue which has been grieved by the complainant under the collective agreement, i.e., whether the respondent violated the collective agreement by failing to treat as employees covered by it certain persons regularly employed for more than twenty-four hours per week, the Board might well defer to arbitration of that matter. However, the essence of the present complaint is that the respondent reacted to that grievance by either terminating the employment, or reducing the hours of all the employees to whom that grievance related. It cannot be said that the matters in dispute between the parties are primarily contractual in nature or that the resolution of the grievance which has been filed will be congruent with the resolution of this unfair labour practice. While an arbitrator could deal with the alleged terminations, it is not self-evident that an arbitrator would have jurisdiction to remedy the alleged reduction of work hours. Such reduction might be a management right unfettered by the terms of the collective agreement but nevertheless restricted by the provisions of the *Labour Relations Act*. Even if an arbitrator could apply and interpret those statutory provisions, which is not free of doubt, it is this Board which has the primary responsibility of so doing and which is in the best position to interpret those provisions on a continuing basis in light of the evolving needs of the Ontario labour relations community. In view of the fact that this is a first agreement situation which affects a substantial segment of what is alleged to be the respondent's work force which allegedly should be covered by the provisions of the collective agreement, the need for the Board's broader remedial approach, including the posting of notices, is also a matter of significance. Thus, in accordance with the principles set forth in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254, we will not defer this matter to arbitration.

With respect to the question of notice to the personnel agencies through whom the respondent is alleged to have hired the individuals in question, in the absence of any allegation by the complainant that any of those agencies has breached the Act, and in the absence of any attempt by the complainant to have the Board direct a remedy against such agency, the Board does not find it necessary or appropriate to require that notice of these proceedings be given to those agencies."

4. This complaint relates to the respondent's distribution centre (the "Centre") on Torbram Road, Brampton, which is the main distribution centre for K Mart (and Kresge) in Canada. For many years the respondent has used workers supplied by various employment agencies to supplement its work force during the busy periods which

precede Christmas, Easter, and Mothers' Day. Requests for such workers are made by Roy Westbrook, the Assistant Manager of the Centre, who telephones one or more of the agencies with which the respondent does business, and requests that a specified number of workers be sent to the Centre.

5. Prior to the opening of the Centre in 1975, the respondent's distribution centre was located on Progress Avenue in Scarborough. In addition to its regular work force of 50 to 60 employees, the respondent also used workers supplied by various employment agencies during peak periods at that location. However, those persons generally worked there for only a week or two.

6. In 1975 the union was certified in respect of a bargaining unit of the respondent's employees similar to that for which it currently holds bargaining rights. A strike commenced in June of 1976 and continued until December of that year, at which time the union agreed to abandon its bargaining rights and the respondent agreed to recall approximately 90 of the employees who had been on strike. By 1977 there were between 100 and 110 regular employees of the respondent employed at the Torbram Road distribution centre. However, that number was reduced because the respondent found that fewer employees were needed due to the efficiency of the Centre's mechanized systems.

7. During the period from January 1977 to February of 1980, the employees of the Centre were not represented by a trade union. However, the respondent established a committee of management and employee representatives (the "Committee") to meet periodically to discuss working conditions and other matters relating to the Centre. The four employee representatives on the Committee were elected annually by secret ballot.

8. The respondent laid off about 40 employees from the Centre in the early summer of 1977. Some of those employees were recalled to an evening shift in the fall of that year, and continued to work on that shift until January of 1978 when the respondent terminated that shift and transferred them to the day shift. At a Committee meeting on January 11, 1978 at which Jack Priestley (who is now the complainant's chief steward at the Centre) was one of the four employee representatives in attendance, management indicated that K Mart did not intend to hire additional staff at the Centre even though the work force had significantly decreased (to approximately 40 employees) over the preceding year. Instead, it planned to use temporary help to deal with any backlogs in order to avoid the disruptions associated with layoffs arising from staff reductions, and in order to stay within the "cost to sales" ratio established by management. A further discussion of "temporary help" took place at the April 20, 1979 meeting of the Committee, at which it was agreed that it was in the best interests of the respondent's permanent employees that "temporary men be hired rather than hiring full-time employees", since the use of temporary employees "meant job security for the permanent employees" who were less likely to be laid off when business slowed down.

9. The applicant was certified by the Board, differently constituted, in an unreported decision dated February 20, 1980 (Board File No. 2062-79-R), for the following bargaining unit: "all employees of the respondent working in its distribution centre in Brampton, Ontario, save and except foremen, those above the rank of foreman, office



and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". At the time of that application there were about 45 employees in the bargaining unit.

10. During the ensuing negotiations, the union tabled detailed proposals concerning "temporary" workers. It proposed that the following language be included in the recognition clause:

"No temporary or casual help will be retained, and no work will be contracted out, which will result in a reduction of the working force or which would deprive employees of overtime or while regular full-time employees are working fewer than the normal hours, or while regular full-time employees are laid off and are then available and able to do the work required; provided that no employee who has acquired seniority shall lose his seniority by refusing temporary work while on layoff. Temporary work, for the purpose of this section, shall be any period less than 30 calendar days."

The union also proposed the following appendix:

#### "APPENDIX 'A'

1. Students, part-timers and temporary employees will for the purposes of this Agreement be termed to be Casuals and shall not work in excess of twenty-four (24) hours per week except as specifically covered in Article 12 hereunder.

2. Casual employees are employees retained to cover short term fluctuations in the workload and to replace regular employees who are on vacation or absent.

3. Casual employees will acquire seniority after they have served thirty (30) worked days of employment and will be on a separate seniority list.

4. Casual employees will be called in for casual work in accordance with seniority.

5. Casual employees who decline the opportunity of casual work three (3) times in a month period will be removed from the Casual Seniority List.

6. Casual employees who have worked their probationary period as provided in Article 3 above will have the right to the Grievance Procedure as provided in Article 4 of the Agreement governing regular full-time employees.

7. Casual employees will be paid the probationary rate during their probationary period and will be paid the applicable job rate

thereafter. Casual employees will also be paid the applicable overtime rate as outlined in this Agreement if they work outside the standard hours of work.

8. Casual employees will not be covered by Health and Welfare benefits provided in Sections 12.01, 12.02 and 12.08 of Article 12 of the Agreement of which this Appendix is a part, and will only be covered by the following benefits:

8. (a) Vacation pay in accordance with the Ontario Employment Standards Act;

(b) Statutory Holidays as set forth in Article 8 upon acquiring seniority;

(c) O.H.I.P. for casuuls who work in excess of sixty-four (64) hours in any calendar month.

9. Casual employees who desire full time work with the Company will make this known to the Company in writing on an annual basis. These employees will then be considered for full time work by seniority if this work is available. If accepted for full time employment by the Company, these employees must complete the thirty (30) worked days probationary period from the date of this employment as outlined in Article 6.01, notwithstanding any other section of this Agreement.

10. No casual employee shall be retained for overtime until four (4) hours of overtime have been offered to all full time employees within the warehouse where the work is to be performed. In the case of Saturday, Sunday, or Statutory Holiday, no casual employees shall be retained for work until all full time employees within the bargaining unit have been offered eight (8) hours' work.

11. The probationary rate for casual employees shall be \$0.15 per hour less than the casual rate.

12. Casual employees may work thirty eight and three-quarters (38-3/4) hours per week on a one for one basis to cover employees on vacation."

11. On February 19, 1981, the parties entered into a collective agreement effective from September 1, 1980 to August 31, 1983, in respect of a bargaining unit identical to that described in the aforementioned certificate issued by the Board on February 29, 1980. The events which led to the signing of that document are set forth in *K Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421 (in which the Board, differently constituted, held that the union had not contravened the Act by signing that agreement, notwithstanding the fact that bargaining unit employees had rejected K Mart's proposals by a margin of one vote). That collective agreement did not contain any of the language

proposed by the union with respect to the use of temporary workers, nor any other express limitations on the use of such workers. There is no evidence before the Board that during the course of the negotiations which led to that collective agreement, either party made any assertions or representations concerning the respondent's future use of temporary employees.

12. One of the respondent's sources of "temporary" workers is Bayjan Help Ltd. ("Bayjan") which carries on business under the name "Help Unlimited". Its manager, Robert Harper, testified that K Mart is one of approximately 100 clients to which Bayjan supplies workers. Persons seeking work attend at Bayjan's office in downtown Toronto between 5:30 and 7:00 a.m. Bayjan generally has between 50 to 100 persons available for work daily. If it appears that work may be available for an individual who has not previously been registered, Bayjan's dispatcher registers him by taking his name, address, social insurance number, and skills (if any). If an individual who is sent to work is "short on cash", Bayjan will provide him with an advance of up to \$2.00 per day. The workers are paid by Bayjan each Friday for the work performed by them during the week ending on the preceding Wednesday. Bayjan then immediately bills its clients at an agreed upon rate for each hour of work performed by workers whom it has provided to the clients. Bayjan pays overtime if an individual works more than 44 hours in a particular week. If all that work is performed for one client, Bayjan bills the client for the overtime. However, if the work is performed for two or more clients, Bayjan merely bills each of the clients at their normal rates, and absorbs the overtime cost as a business expense. Bayjan also has a bonus system by which it pays a bonus to each worker who consistently reports for work on time. Bayjan also pays vacation pay (4% of earnings) twice a year, and makes the normal employment deductions such as income tax, unemployment insurance contributions, and Canada Pension Plan contributions. It also pays Workmen's Compensation assessments in respect of the workers it supplies to clients. Workers are transported from Bayjan's office to the Centre and back in a van operated by Bayjan for the purpose of transporting workers to and from customers' locations beyond the area served by the Toronto Transit Commission.

13. Bayjan began to supply workers to the respondent near the end of January of 1982 after Mr. Harper contacted Ed Prostebby, the Director of the Centre, and persuaded him to "give Bayjan a try". Since then, K Mart has become one of Bayjan's biggest customers, accounting for approximately 10 percent of its total business. Some of the persons supplied by Bayjan worked at the Centre for only a few days or weeks. Others worked there for several months, although some of them also occasionally worked during that period at the premises of various other clients of Bayjan, sometimes because of lack of work at the Centre, and other times because they arrived at Bayjan's office too late to obtain a ride to the Centre. If a worker who had been working at the Centre failed to report for work on a particular morning, Bayjan would simply send another worker in his place. Mr. Harper candidly testified that it was "abnormal" for workers supplied by Bayjan to work regularly for a single client, as occurred at K Mart; it was his evidence that "the norm is one or two days". Mr. Harper also testified that if a client wishes to "hire" one of Bayjan's workers, it is supposed to either pay Bayjan a placement fee of \$350, or continue to obtain the worker's services through Bayjan for a period of three weeks after notifying Bayjan of its desire to hire that person. However, the respondent never took any such action since it did not desire to make any of the agency workers regular full-time employees.



14. The Board also heard the evidence of Lou Duggan, who operates A.P. Careers Ltd., which carries on business as "Armor Personnel" and "Tempo". K Mart is one of Tempo's 350 clients. It is unnecessary to describe the operation of Mr. Duggan's company in detail, as it is essentially quite similar to the Bayjan operation described above, although it draws its workers from different sources in view of its Brampton location. Since Tempo does not provide transportation for workers, they report directly to the client's premises until a particular assignment has been completed.

15. Five of the six grievors named in the grievance (described below) were supplied to K Mart by Tempo, namely, Leslie Bodi, Gery O'Donnell, Lutchman Persaud, Stephen Rank and Paul Miller. Mr. Bodi worked an average of about 31 hours per week at the Centre from late April to September of 1982. During that period, Tempo did not assign him to work anywhere else. Mr. O'Donnell averaged about 30 hours per week at the Centre in the period from mid May to September of 1982, although he also worked a total of about 25 hours for two other Tempo clients during that period in order to "fill out his work week" during weeks when K Mart did not provide him with a sufficient number of hours. Mr. Persaud worked exclusively at the Centre from January 4, 1982 until October 10, 1982. During 32 of the 38 weeks in that period, he worked over 30 hours (per week) at K Mart. Mr. Rank also worked exclusively at the Centre from mid January to September of 1982, working over 30 hours per week in all but six of those weeks. Mr. Miller also averaged over 30 hours per week at the Centre between mid July of 1982 when he commenced working there, and the time of the grievance. The sixth grievor, Bruce James, was supplied to K Mart by another employment agency known as "Bestwork". Mr. James also worked quite steadily at the Centre from mid January to September of 1982. During that period he averaged over 35 hours of work at the Centre per week.

16. When a new worker is sent to the Centre by an employment agency, he is given a time card bearing his name and the name of the employment agency which referred him. That time card is placed in the same rack as the time cards of the respondent's regular full-time employees, who punch the same time clock as agency personnel. After showing the new worker around the Centre and explaining its operations, Mr. Westbrook then takes him to the department where he will be working and introduces him to the departmental supervisor who will direct and control his work. If after a day or two the supervisor is not satisfied with the pace or quality of the work being performed by the new worker, Mr. Westbrook calls the agency and directs it to replace him (if the respondent continues to need the services of such a worker).

17. Agency personnel begin work and leave work at the same time as the respondent's regular workers; they also work the same number of hours per day and have the same coffee and lunch breaks. The work performed by agency personnel is the same work that is performed by regular bargaining unit employees, namely, "warehousing and handling freight". Agency personnel work "right alongside" regular employees and are "indistinguishable" from them. The respondent's supervisors give directions to agency personnel in the same manner that they direct the respondent's regular work force. All supervision of their work is done by K Mart supervisors; none of the employment agencies have their own supervisors at the respondent's premises. Agency personnel are permitted to purchase damaged merchandise at a reduced price in the same way that regular employees do. At the end of each week, Mr. Westbrook fills out a time sheet for each of the agencies. The agencies use those sheets to determine the number of hours of

work for which each of the workers is to be paid in respect of work performed at the Centre. When the respondent no longer requires the services of one or more agency workers, management either calls the agency and instructs them to cease sending those workers, or tells the workers directly not to come in the following work day.

18. There is some evidence that Messrs. O'Donnell and Rank, the two "temporary" employees who testified before the Board in these proceedings, perceived themselves to be employees of Tempo rather than the respondent; in cross-examination they agreed with counsel for the respondent that it would be necessary to fill in an employment application at the respondent's front office "to become an employee of K Mart". Indeed, Mr. Rank testified that he had completed such an application and submitted it to the respondent. However, their signing of the grievance (set forth below) indicates that their perception in that regard was not altogether unequivocal.

19. Over the years, and particularly since the aforementioned collective agreement was entered into, the respondent has used an increasing number of workers supplied by the employment agencies. In addition to substantially increasing the number of such workers, the respondent has used such workers for considerably longer periods of time. In 1978 agency personnel worked a total of only twelve full-time weeks at the Centre. In 1979 that figure increased to 79, with a further increase to 87 in 1980. However, in 1981 that figure increased by over 600% to 574 full-time weeks. By October 22, agency workers had worked a total of 947 full-time weeks in 1982. (The number of part-time weeks worked at the Centre by agency personnel also showed a very great increase from 5, 25, and 22 in 1978, 1979, and 1980, respectively, to 364 in 1981 and 699 in the first ten months of 1982).

20. In February of 1981 there were approximately 40 regular full-time employees of the respondent covered by the collective agreement. Although the respondent hired one or two regular full-time employees during the period from the execution of the collective agreement to the commencement of hearing of this complaint, there was a net reduction in the total number of such employees through attrition during that period. Thus, it is apparent that the respondent has ordered its affairs so as to handle its substantially increased work load by using workers supplied by agencies rather than regular full-time employees hired directly by K Mart. Thus, on the evidence as a whole, it is clear that over the years, and particularly since the union and the respondent entered into a collective agreement in February of 1981, the respondent has substantially changed its usage of temporary employees. Instead of using them only during peak periods, it has come to use them throughout the year; for example, from October of 1981 to September of 1982, the respondent generally had between 20 and 25 agency personnel working at the Centre alongside its regular work force. Moreover, a number of the persons supplied by agencies have worked more than 24 hours per week at the Centre for an extended period of time, rather than merely working there for a few days or weeks as was originally the norm.

21. Mr. Prostebby testified that the increased use of agency workers in 1982 resulted from a substantial increase in the Centre's work load due to the remodelling of sixty Canadian K Mart stores, the closing of approximately 30 K Mart automotive centres, the promotion of a large scale "soap program" in the respondent's stores, and the doubling of the respondent's shipping scheduled (from once a week to twice a week) on

an experimental basis. However, the respondent's use of a substantial number of temporary employees continued in September of 1982 after the bulk of that work had been completed. Accordingly, there is ample support for counsel for the complainant's contention that by September of 1982, the respondent's use of such workers could no longer be accurately described as "temporary".

22. Mr. Prostebby also testified that the "two main advantages of using temporary employees rather than regular employees" are that the respondent can adjust the number of people it needs to do "casual labour" on a day to day basis, and that the rates the agencies charge are substantially less than the amount the respondent would otherwise pay for the performance of the work in question. During 1982, K Mart paid the agencies between \$6.10 and \$7.28 per hour for the services of each worker supplied by them. That rate is substantially less than the cost of employing a regular employee under the terms and conditions specified in the collective agreement between the complainant and the respondent. Under that agreement, the hourly wage rate in effect in 1982 ranged from \$5.55 to \$10.42, and the agreement also provided for a number of fringe benefits which cost the respondent "approximately 30% of base salary".

23. As a result of inquiries by some of the agency workers concerning whether there was anything the union could do to assist them in obtaining the protection and financial benefits of the collective agreement, Mr. Priestley contacted union business agent Joe Bigeau, who arranged for Mr. Priestley to meet with a member of the union's law firm to discuss the situation. Following that consultation, the following grievance was prepared by that firm:

"The Union grieves on its own behalf and on behalf of those persons who are regularly employed for more than twenty-four hours per week with respect to the following:

A number of persons are, in fact, regularly employed for more than twenty-four hours per week yet are not being treated as employees covered by the collective agreement.

The relief requested is a declaration that the collective agreement has been violated and that the Company cease violating the collective agreement, and a declaration that these persons are employees covered by the collective agreement.

Further relief is requested in terms of compensation and damages, union dues, etc. for the violation.

The persons affected are those listed on on *Schedule 'A'* attached hereto and there may be more that we are not aware of.

This grievance may be dealt with at *Step 1* or *Step 11* depending upon your wishes."

The persons listed on Schedule "A" to that grievance are Lutchman Persaud, Leslie Bodi, Paul Miller, Stephen Rank, Gery O'Donnell, and Bruce James (hereinafter referred to as the "grievors").



24. After the grievors had signed the grievance (with the exception of Mr. Miller, whom Mr. Priestley was unable to locate at the Centre prior to filing the grievance), Mr. Priestley folded and stapled the grievance and brought it to Mr. Prostebby's office around 3:30 p.m. on September 17, 1982. When he found that Mr. Prostebby was not in his office, Mr. Priestley left the grievance with Helen Vail, Mr. Prostebby's secretary, who placed it on Mr. Prostebby's desk without reading it. Mr. Prostebby was away from the Centre from about 12:30 to 4:00 o'clock that afternoon. By the time he returned to the Centre, Mrs. Vail had left for the day. In view of the hour, he "locked up and went home" without reviewing any of the materials on his desk. Thus, he did not become aware of the grievance until Monday, September 20th, when he found it on his desk early that morning.

25. The grievance that was initially filed with the respondent was not on the union's usual grievance form that had been used for all previous grievances filed with the respondent. However, after the respondent returned the original grievance to Mr. Priestley, a grievance that was virtually identical to the original grievance was subsequently filed on the usual form by the union's business agent. Although Mr. Prostebby suggested that he "didn't take it at first as a grievance" because it "wasn't on a grievance form" and "wasn't signed by a steward", it is clear from the evidence that he quickly recognized that the document was a formal complaint that various temporary employees were "working more than 24 hours per week and not getting the benefit of the collective agreement".

26. After they had discussed the matter, Mr. Prostebby told Mr. Westbrook to "reduce [the agency workers] to three days a week". Consequently, Mr. Westbrook called the agencies and directed them to limit the number of hours worked by any individual worker to a maximum of 24 hours per week. He also subsequently advised them that no agency worker was to work at the Centre for more than three months. Thus, agency personnel, many of whom had been working four or five days a week at the Centre, began to work there a maximum of three days a week. However, there was no decrease in the total number of hours worked by agency personnel, since the number of agency personnel working at the Centre increased from 20 or 25 to approximately 40.

27. Mr. Prostebby conceded in cross-examination that he knew what the union wanted was to have the grievors covered by the collective agreement. However, in his testimony, Mr. Westbrook told the Board that it was his understanding that the union was dissatisfied with the agency people working more than twenty-four hours per week and wanted their hours reduced. Thus, he suggested that management was doing "what the union wanted" when they decided that "the best thing to do was to have [agency personnel] work twenty-four hours". That evidence, in the light of all the circumstances including the contents of the grievance, Mr. Prostebby's understanding of it, and Mr. Westbrook's demeanour as a witness, is not at all credible and casts doubt on the reliability of the balance of Mr. Westbrook's testimony concerning the timing and motivation of the respondent's impugned actions. It is also not entirely without significance in determining the respondent's motivation for its impugned actions that when counsel for the union suggested to Mr. Westbrook in cross-examination that his interpretation of the grievance did not "make sense", Mr. Westbrook stated, "Nothing makes sense to me as far as the union is concerned".

28. As indicated above, prior to the receipt of the aforementioned grievance the

respondent had for a number of years used some temporary employees during peak periods without any complaint from the union or any of its regular employees. Mr. Priestley conceded in cross-examination that although he was aware of the grievors' situation, and was also aware that after the collective agreement was signed the number and length of service of temporary employees increased substantially, he never complained, grieved, or otherwise expressed concern to the respondent about the matter until the filing of the aforementioned grievance, nor did any other union official.

29. When the parties came before another panel of the Board in March of 1982 with respect to a complaint (Board File No. 2420-81-U) by the union (under section 89 of the Act) that the respondent was in breach of the collective bargaining obligation required to be in its collective agreement by section 43 of the Act, they agreed for purposes of that case that there were about 40 employees in the bargaining unit and that there were "a number of 'temporary' employees not considered part of the unit". Their agreement is reflected in the following passage from the Board's decision (reported in [1982] OLRB Rep. June 903):

"5. There are approximately 40 employees in the bargaining unit and this number is apparently relatively constant (although there are a number of 'temporary' employees who are not considered part of the bargaining unit) ...."

While that agreement clearly indicates that the union was aware of the respondent's use of "temporary" employees, it does not preclude the union from pursuing the present complaint for, as noted by union counsel, that factual agreement was made only for the purpose of the earlier complaint in which the employment status of the temporary workers was of little or no relevance to the legal issues in dispute in those proceedings.

30. When asked in cross-examination why the union waited so long to grieve the matter, Mr. Priestley stated that it was only in late 1981 and 1982 that the "numbers" of temporary workers "really struck home". He also testified that there was "no particular reason" that the issue came to a head in September; he merely told the Board that "it took a while" because of his "lack of communication with some of the people".

31. Mr. Westbrook testified that on Friday afternoon, September 17th, he directed the supervisors to tell the men supplied by the agencies not to come in on the following Monday because the work was "caught up" and things were "very slow" at the Centre. That temporary cutback in agency personnel resulted from the "very small" orders received by the Centre during that period. Thus, near the end of their shift on September 17th, a number of temporary employees, including Messrs. O'Donnell and Rank, were told not to come in on the following Monday because there was "not enough work for everybody". However, it was their understanding that they were to report for work at the Centre on Tuesday. Indeed, Mr. Rank testified that his foreman, Walter Pitka, specifically told him to "show up on Tuesday" (September 21st). Although Mr. Pitka denied giving Mr. Rank any instructions on September 17th about not reporting for work on September 20th or reporting for work on September 21st, we are satisfied that his recollection in that regard is less reliable than that of Mr. Rank. The unreliability of Mr. Pitka's recollection of the pertinent events on the day in question is underlined by the fact that his testimony as to his belief that Mr. Rank was not at work on September 17th is contradicted by the respondent's documentary evidence which clearly confirms that Mr. Rank was indeed at

work at the Centre that day. His evidence is also inconsistent with that of Mr. Westbrook.

32. Although we are satisfied that the respondent's decision to direct various agency workers, including the grievors, not to report for work at the Centre on September 20th was motivated solely by the paucity of work required to be performed that day, having regard to all of the circumstances we find that the fact that they signed the grievance and authorized the union to file it with the respondent on their behalf was at least one of the reasons why the respondent refused to continue to have Mr. Rank and Mr. O'Donnell perform work at the Centre after September 20, 1982. In reaching this conclusion, we have considered the demeanour of the various witnesses who testified before us and their respective credibility, as well as the inferences which may reasonably be drawn from the established facts. The circumstances surrounding the termination of Mr. Rank are particularly enlightening with respect to the issue of the respondent's motivation. Mr. Rank was described by Mr. Prostebby as "one of the longest service temporary employees" at the Centre. He had worked in "repack" and in shipping where he had become a "checker". Although he was removed from the latter position due at least in part to certain errors which he made, that removal occurred about a month before he was terminated. After ceasing to be a checker, Mr. Rank continued to work in the shipping department. Thus, it is apparent that his errors as a checker were not at the time viewed by management as being such a serious matter as to require his removal from the Centre. Similarly, it is apparent from the evidence that certain order "mix-ups" involving Mr. O'Donnell took on an importance after September 17th which had not previously been attributed to them by management. Indeed, some of the incidents had never been drawn to Mr. O'Donnell's attention until he testified in these proceedings. There was also some suggestion by management in these proceedings that Mr. O'Donnell was unable to see well enough through the cracked lenses in his glasses to properly perform his job duties. However, the evidence as a whole suggests that this was not a matter of any real concern to management prior to the grievance. Although Mr. O'Donnell's supervisor asked him about his glasses about a week before he was terminated, he accepted as legitimate Mr. O'Donnell's concern that his new glasses might be broken if he wore them at the Centre and, accordingly, did not tell him that he had to wear his new glasses while at work.

33. In reaching the above conclusion concerning the respondent's motivation, we have also taken into account the fact that there were a number of substantial conflicts in the evidence concerning the termination of various grievors as workers at the Centre. Mr. Westbrook testified that earlier in the work week of September 13-17, he "could have" contacted Tempo about terminating some of the Tempo workers. He vaguely recalled telling Tempo, ostensibly at some point prior to the grievance, not to send Mr. O'Donnell to the Centre anymore, but he apparently had no recollection of instructing Tempo to terminate any of the other grievors, and offered no satisfactory explanation for the respondent's decision to terminate them. With respect to the decision to terminate Mr. O'Donnell, Mr. Westbrook told the Board, "O'Donnell's supervisor said he was too slow so we just cut him." Mr. Prostebby testified that he had a short meeting with Mr. Westbrook on Thursday, September 16th at which they decided "that the number of days at work for the temporaries would be reduced for the following week" because of a shortage of work. It was also his evidence that he instructed Mr. Westbrook at that time to instruct the agency not to send Mr. Rank to the Centre anymore because his supervisor was unhappy with his work and his attitude. Mr. Duggan testified that Mr.



Westbrook telephoned Tempo around noon on Thursday, September 16th, and asked the company to cease assigning Messrs. Bodi, O'Donnell, Persaud, and Rank to work at the Centre. However, we do not find his evidence concerning that matter to be reliable; not only is it entirely hearsay, but it also appears to us to be based upon his *ex post facto* rationalization of what "must have happened" in view of the documentary evidence which indicates that Mr. Rank's and Mr. O'Donnell's last day at work at K Mart was Friday, September 17th. Moreover, his testimony is in conflict with that of Barbara Amarol, the Tempo dispatcher who actually received Mr. Westbrook's call. It was Mrs. Amarol's evidence that Mr. Westbrook telephoned "somewhere around the start of the week of September 12th – either Monday, Tuesday or Wednesday, ... not on Thursday or Friday", and told her that he wanted to terminate Messrs. Persaud, Bodi, Rank and O'Donnell, who had been at the Centre "for quite a long time". It was also her evidence that she called each of those employees, except Mr. Persaud, at home "at the end of the week, ... either Thursday the 16th or Friday the 17th" and told them that their K Mart job was finished. Thus, her evidence in that regard contradicts not only that of Mr. Duggan but also that of Mr. Westbrook.

34. Mr. Rank testified that he was given no indication by anyone that his K Mart work was finished until Mrs. Amarol telephoned him around 4:00 p.m. on Monday, September 20th and told him that K Mart was "cutting back on all the temporaries because of a shortage of work". It was also his evidence that when he inquired how long the cut-back was going to last, Mrs. Amarol said "around a couple of weeks" but that she "wasn't sure". It was Mr. O'Donnell's evidence that he was unaware of his termination until Monday, September 20th when he telephoned Tempo around noon (to confirm that he would be working at the Centre the next day) and was told that "the job was finished" because K Mart "didn't want [him] back anymore. Mrs. Amarol also recalled that conversation, but maintained that it was her second telephone conversation with Mr. O'Donnell about that matter. It was also her evidence that when she spoke with Mr. O'Donnell on September 20th, he was upset with the situation because he did not think it was fair. It was her recollection that the conversation occurred about 8:30 in the morning rather than at noon.

35. On balance, we find the evidence of the grievors to be more reliable concerning the timing of their terminations than that of the witnesses called by the respondent, whose conflicting versions are incapable of being reconciled and appear to the Board to be based more on *ex post facto* rationalizations than on their independent recollection of the events in question. We have also taken into account the fact that the calls would probably be of greater importance to the grievors, whose economic well-being was on the line, than they would be to Mrs. Amarol, who makes a great many calls to workers as part of her normal duties. Therefore, having regard to all of the circumstances, including the high degree of improbability that management's decision to terminate four of the six grievors shortly after they signed the grievance was merely a remarkable coincidence, we find that on or about September 20th, after becoming aware of the grievance, management contacted Tempo and instructed that agency to advise Messrs. Rank, O'Donnell, Bodi, and Persaud to cease reporting for work at the Centre. Tempo was unable to contact Mr. Bodi, who continued to work at the Centre for about two more weeks before the respondent again directed Tempo not to send Mr. Bodi back to the Centre anymore. When Mr. Westbrook advised Mr. Duggan later in the week of September 20th that K Mart had need of another agency worker since one of them had

not reported for work that day, Mr. Duggan told him that Mr. Persaud was available and asked if it would be all right to send him. Mr. Westbrook agreed and, accordingly, Mr. Persaud returned to work at the Centre for several more days, until the week of October 4th, when he quit working at the Centre due to the economic consequences of the reduction of his hours of work to less than 24 hours per week. Paul Miller and Bruce James also quit working at the Centre after the grievance was filed and their hours of work were reduced to less than 24 per week.

36. One of the issues which the Board must decide in these proceedings is whether or not the grievors are employees of the respondent. The Board's power to make that determination is derived not only from section 89, but also from section 106(2) of the Act, under which "the decision of the Board thereon is final and conclusive for all purposes". Counsel for the union contended that the grievors were employees of the respondent for purposes of the *Labour Relations Act*. In support of that contention, he referred the Board to a number of Board decisions and arbitration awards. Counsel for K Mart, on the other hand, argued that the persons in question were employees of the respective agencies which supplied their services to the respondent. He also referred the Board to a number of judicial and administrative authorities, and emphasized that "control", which originated as one of the primary tort law criteria pertinent to the issue of an employer's vicarious liability, should be entirely disregarded, or given very little weight in determining whether the respondent is the employer of the "temporary" employees supplied to K Mart by various employment agencies.

37. The criteria which the Board considers helpful in determining which of two (or more) entities is the employer for purposes of the *Labour Relations Act* include the following:

- (1) the party exercising direction and control over the employees;
- (2) the party bearing the burden of remuneration;
- (3) the party imposing discipline;
- (4) the party hiring the employees;
- (5) the party with authority to dismiss the employees;
- (6) the party who is perceived to be the employer by the employees;  
and
- (7) the existence of an intention to create the relationship of employer and employee.

(See, for example, *Windsor Airline Limousine Services Limited*, [1981] OLRB Rep. March 398; *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538; *Toronto Arts Productions*, [1980] OLRB Rep. Sept. 1556; and *The Tower Company (1961) Ltd.*, [1979] OLRB Rep. June 583; and the numerous authorities cited therein.) The cases have generally not assigned any particular order of priority to those factors, but rather have tended to indicate that the weight to be given to each factor must depend upon the facts of each

case. However, the Board has tended to attach considerable significance to “overriding control” in determining which of two or more entities is the employer of certain persons. Moreover, the Board has consistently found that neither private arrangements as to who is the employer, nor administrative paymaster arrangements, are indicative of the true employer.

38. In the present case the respondent exercises a high degree of control over the workers in question. The respondent’s supervisors not only tell them what tasks they are to perform, but also direct them in the manner in which they are to be performed. It is the respondent which determines what hours will be worked by those workers at its premises, when they will take their breaks, and when they will eat lunch. Although the particular workers to be assigned to the respondent’s premises are initially determined by the various employment agencies as the respondent’s agents, it is the respondent which makes the ultimate determination concerning whether an individual will be permitted to continue to work at the Centre or will be discontinued or replaced. Thus, the respondent exercises substantial control over those workers, similar in many respects to the control which it exercises over regular full-time K Mart employees. Although the agencies serve as paymasters for K Mart in respect of the workers which they supply to the Centre, it is the respondent that bears the ultimate burden of their remuneration; as indicated above, after paying the workers, the agencies immediately invoice K Mart for each hour of work performed by them at the Centre. The evidence concerning imposition of discipline is of little assistance to the Board in resolving this matter since little or no disciplinary action is taken against any of the employees in question by either the respondent or the agencies. Instead of using any form of progressive discipline, the respondent simply removes any unsatisfactory agency worker from the Centre through a direction that the agency cease referring that person to the respondent’s premises. That removal is tantamount to a discharge vis-a-vis the respondent, although the individual in question may thereafter be assigned by the agency to provide services to another client. Thus, the respondent clearly has the authority to direct that any of the employees in question cease working at its premises.

39. Although neither of the two agency workers who testified before the Board identified the respondent as their employer, their signatures on the grievance provide some indication that their perception in that regard is not unequivocal. Moreover, the perception of the employees is but one of the factors to be considered and is not conclusive [see *Re Seafarers’ International Union of Canada and Kent Line Ltd.* (1972)], 27 D.L.R. (3d) 105 (Fed. C.A.)], particularly in a situation where an employer has structured its affairs in a manner which deliberately attempts to evade collective agreement obligations in respect of a substantial number of individuals performing bargaining unit work on its premises. Similar observations are applicable to the seventh criterion, i.e., the existence of an intention to create the relationship of employer and employee. On balance, we find that the respondent’s intention was to create an arrangement whereby it could have all of the advantages of an employer-employee relationship without incurring the collective agreement obligations that apply to an employee in the context of a unionized operation such as the Centre. While its original intention of using temporary employees in peak periods to minimize layoffs among its regular full-time employees may not have been objectionable, the respondent’s intention took on an anti-union aspect after the union duly obtained bargaining rights and the respondent directed virtually all of its increased work load to “temporary employees”



whose numbers and length of service increased dramatically, thereby enabling it to avoid hiring regular full-time employees who would unquestionably be within the bargaining unit. Moreover, the respondent's reference to cost-saving is not a valid defence to its actions. It is common knowledge that unionization of a work place can have an economic impact on an employer's business. Indeed, it is the potential for increased remuneration which (at least in more prosperous economic times) constitutes one of the primary "selling points" of the union movement. In dealing with somewhat similar considerations in *Westinghouse Canada*, [1980] OLRB Rep. Apr. 577, the Board:

"63. The purpose of *The Labour Relations Act* is to provide a statutory framework within which employees are encouraged to join together and bargain collectively with their employer. The underlying assumption is that employees who bargain collectively are on a more equal footing with their employer than unorganized employees and have a greater say in determining their terms and conditions of employment. It is axiomatic, therefore, that collective bargaining as established under the Act has an economic impact in terms of both the price of labour and the scope of the employer's unilateral authority. Under our Act the employee's share of the economic pie and the scope of management's authority vis-a-vis employee relations must be determined at the bargaining table and against the backdrop of possible economic sanctions by either side. An employer whose employees have decided to bargain collectively cannot escape his obligations under *The Labour Relations Act* and any decision taken to avoid these obligations or to defeat the legitimate collective bargaining aspirations of his employees is in violation of the Act. Under our statute accommodation is sought at the bargaining table. An employer who contracts out his work, relocates or closes his plant or takes any other major business decision to avoid having to deal with his employees collectively through a trade union or to avoid the possibility, in the abstract, of being subject to economic sanctions is guilty of an unfair labour practice and the Board has so found in a number of cases ...."

40. This is not the first case in which the Board has been called upon to determine whether workers supplied to a company by an employment agency are employees of the agency or employees of the company. For example, in *The Welland County Board of Education*, [1972] OLRB Oct. 884, the Board found that certain secretaries who had been transferred by the School Board to the payroll of Office Overload, an existing employment agency, remained employees of the School Board for purposes of the *Labour Relations Act*. Similarly, in *Ralston Purina Canada Inc.*, [1979] OLRB Rep. June 552, the Board found that persons applied to that company by International Personnel Ltd. were employees of the former on the basis of the following facts (set forth in paragraph 3 of the decision):

"Ralston Purina is party to a verbal agreement with International Personnel under which International Personnel assigns persons who are selected by Ralston Purina to work for Ralston Purina at a leased facility in Mississauga. International Personnel is responsible for paying these persons an hourly rate agreed to in negotiation with

Ralston and for providing and administering the benefit plans covering these persons. The Unemployment Insurance premiums and Ontario Health Insurance Plan premiums are paid through International Personnel on behalf of these persons. International Personnel is paid a fee by Ralston which allows it to recoup its costs and to realize a profit. The persons supplied by International Personnel work for Ralston, are supervised by employees of Ralston and may be terminated by Ralston. The facility at which these persons work is a temporary facility. The company occupies a permanent facility in Mississauga for which the Grain Millers Union holds bargaining rights covering that specific location. The officials of Ralston were never of the view that the persons supplied by International Personnel to work as its temporary location were its employees.”

41. The issue of whether a personnel agency (“Manpower Business Services”) or its client (Templet Services) was the employer of “five or six persons” who were installing library shelving at a research centre came before the Board in *Templet Services*, [1974] OLRB Rep. Sept. 606. In that application for certification by Carpenters’ Local 93, the Board found the individuals in question to be employees of the agency. Although a number of the pertinent facts of that case are similar to those of the present case, it is distinguishable on the basis of the relative permanence of the relationship between a number of agency workers (including the grievors) and K Mart, the existence of bargaining unit employees who work side by side with agency workers performing identical tasks under common supervision and control, and the anti-union animus which we find to have been a significant element in the respondent’s substantially expanded use of such workers at the Centre in 1981 and 1982.

42. There are also a number of arbitration awards which have found workers supplied to companies by employment agencies, under arrangements similar to those between K Mart and the agencies described above, to be employees of those companies for labour relation purposes. See, for example, *Re Regional Municipality of Waterloo and London and District Service Workers’ Union, Local 220* (1977), 16 L.A.C. (2d) 280 (Brandt); *Re Goodyear Tire & Rubber Co. of Canada Ltd. and United Rubber, Cork, Linoleum & Plastic Workers, Local 232* (1977), 16 L.A.C. (2d) 177 (Gorsky); *Re Board of Governors of Riverdale Hospital and Canadian Union of Public Employees, Local 79* (1974), 7 L.A.C. (2d) 40 (Shiff); and *International Association of Machinists and Philco Corp. of Canada Ltd.* (1963), 13 L.A.C. 291 (Hanrahan). (Cf. *Re City of Kelowna and Canadian Union of Public Employees, Local 38* (1980), 25 L.A.C. (2d) 314 (Larson), in which an arbitration board found that although workers obtained from an employment agency did not normally become employees of the City, the City had “an obligation to contract for them upon terms consonant with the collective agreement *mutatis mutandis*. See also *Re Ford Motor Co. of Canada Ltd. and Plant Guard Workers, Local 1958* (1981), 1 L.A.C. (3d) 141 (MacDowell), which contains a useful review of the pertinent arbitral and Board jurisprudence. In that case, the arbitrator found that security guards provided by a security service company remained employees of that company and did not become Ford employees since all of the indicia, except control, pointed to the security company as employer, and “control” presented a “mixed and equivocal” picture.)

43. Accordingly, having regard to all of the circumstances and the relevant jurisprudence, the Board finds that the grievors were at all material times employees of

the respondent for purposes of the *Labour Relations Act*. We further find that at the time the grievance was filed, the grievors were bargaining unit employees under the collective agreement in that they were "employees of the [respondent] Company working at its distribution centre in Brampton, Ontario" and were not foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week, or students employed during the school vacation period.

44. Dismissing or otherwise discriminating against a person for filing a grievance, or causing a grievance to be filed, is a breach of section 66 of the Act; see, for example, *Bedard Girard Ontario*, [1981] OLRB Rep. Oct. 1338, at paragraphs 30 and 31. (See also *The Fanshawe College of Applied Arts and Technology*, [1980] OLRB Rep. Oct. 1392; *K-Mart Candaa Limited*, [1982] OLRB Rep. Jan. 64; and *Canadian Red Cross Blood Transfusion Service, Hamilton*, [1981] OLRB Rep. Apr. 425. In the latter case, the Board held that the circulation of a petition by a "temporary full-time employee" who was not in the bargaining unit, in an effort to obtain effective union representation for temporary employees, was a right protected by section 66 of the Act.) Such actions may also contravene section 80(1) of the Act which provides:

"No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten dismissal or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act."

In *Ontario Nurses' Association*, [1982] OLRB Rep. Oct. 1546, the Board held that a grievance hearing before a board of arbitration or a sole arbitrator is a "proceeding under the Act" within the meaning of section 80. Accordingly, if an employer dismisses, discriminates against, or imposes a pecuniary or other penalty on a person in whole or in part because of a belief that he may testify at an arbitration hearing, or because he has participated or is about to participate in an arbitration proceeding, the employer thereby contravenes section 80(1) of the Act. (See also *The International Association of Bridge, Structural and Ornamental Ironworkers*, [1982] OLRB Rep. Oct. 1487, at paragraphs 67 to 72, in which the Board confirmed the applicability of the "taint theory" to section 89 complaints involving alleged contraventions of section 80).

45. Having regard to all of the circumstances, including the rather vague,



contradictory, and generally unsatisfactory evidence adduced by the respondent with respect to the timing of its actions, and the implausibility of the reasons given by management for those actions, the Board finds that a desire to penalize the grievors for filing the grievance formed at least part of the respondent's motivation for refusing to continue to employ the grievors Stephen Rank and Gery O'Donnell on and after September 20, 1983, for refusing to continue to employ Lutchman Persaud on and after October 4, 1982, and for reducing the hours of work of Messrs. Persaud, Bodi, Miller, and James to less than 24 hours per week following receipt of the grievance. In making this finding, we reject the respondent's contention that it was merely a coincidence that at or about the time of the grievance, it directed Tempo to cease sending to the Centre four of the six grievors. We are also not persuaded that the respondent's subsequent decision to permit Messrs. Bodi and Persaud to continue working at the Centre with substantially reduced hours is inconsistent with a finding of anti-union motivation. As noted above, approximately two weeks later the respondent renewed its refusal to continue to employ Mr. Bodi. Moreover, the reduction of the weekly hours of work of the other grievors ultimately prompted each of them to cease working at the Centre. Under the circumstances, we infer that this consequence was both expected and intended by management. Accordingly, the Board finds that the respondent contravened section 66 of the Act by refusing to continue to employ Stephen Rank, Gery O'Donnell, and Lutchman Persaud, and by reducing the hours of work of Paul Miller, Bruce James, Leslie Bodi and the said Lutchman Persaud to less than twenty-four hours per week. We also find that those actions contravened section 80(1) in that they were motivated at least in part by a belief that the grievors might testify in arbitration proceedings flowing from that grievance.

46. We further find that the respondent intentionally interfered with union representation of the grievors contrary to section 64 of the Act. As noted above, we are satisfied on the balance of probabilities that the respondent was motivated at least in part by anti-union animus when it substantially increased its use of workers supplied by employment agencies following the certification of the union in February of 1980. This finding of a breach of section 64 is not dependent upon our finding that the grievors were employees of the respondent; the respondent's contravention of section 64 consists of intentionally depriving the grievors of representation by the applicant by ordering its operations in such manner as to attempt to keep them beyond the ambit of the bargaining unit, notwithstanding the fact that they were regularly performing bargaining unit work at the Centre for more than twenty-four hours per week. In effect, the respondent sought to undermine the union's bargaining rights by "contracting in" temporary employees such as the grievors, to handle substantial increases in warehouse work that would otherwise have been performed by employees in the bargaining unit for whom the union had been certified. In *Sunnycrest Nursing Homes Limited*, [1981] OLRB Rep. Feb. 261, a case involving the somewhat analogous situation of an employer who contracted out the work of one quarter of its work force, the Board wrote as follows:

"24. In this jurisdiction, the Legislature has mandated collective bargaining as a socially desirable means by which employees, through self-organization and collective representation, can participate in the determination of their terms and conditions of employment. To support this process, the *Labour Relations Act* proscribes various employer practices which could undermine the freedom of employees to select a trade union and engage in collective bargaining. The

principal employer unfair labour practice provisions are [sections 64, 66 and 70, read in conjunction with sections 3 and 89(5) of the Act] ....These sections, together with the broad remedial authority granted to the Board, shore up the exercise of employee rights and protect freedoms which, without them, would be largely illusory. So important are these employee rights that the Legislature has considered it appropriate to cast a legal onus upon the employer to demonstrate that he has not interfered with their exercise. (See section 89(5).)

25. It is self evident, of course, that an employer can carry on his business as he sees fit, so long as he does not contravene a collective agreement or the applicable labour legislation. An employer is entirely free to expand or contract his enterprise, close down all or part of it, transfer operations, change the methods of production, or 'contract out' work so long as in so doing, he is motivated by genuine business considerations, rather than a desire to defeat or impede his employees in the exercise of their statutory rights.

26. The onus cast upon an employer to demonstrate the propriety of its conduct has been succinctly stated by the Board in *The Barrie Examiner* [1975] OLRB Rep. October 745, at paragraph 17:

'... the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct.

This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts— first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.'

It will be noted that the anti-union motivation need not be the sole reason for the employer's decision. A contravention is also established in cases of mixed motives—some lawful, others unlawful. (C.f. section 382 of the *Criminal Code* R.S.C. 1970 Chap. C-234; and see: *R v Bushnell Communications et al* (1973) 1 O.R. (2nd) 422 (O.H.C.), aff'd 4 O.R. (2d) 288 (C.A.); *Sheehan and Upper Lakes Shipping Limited et al* (1977) 81 D.L.R. (3d) 208; *Westinghouse Canada Limited* [1980] OLRB Rep. April 577—application for judicial review dismissed, 80 CLLC ¶14,062 (Ontario Divisional Court).) The issue of motivation is decisive, and the Board must draw inferences and reach a conclusion on that issue in light of the established facts.

27. We do not think it is necessary to review the many Board cases in

which the employer's conduct has been impugned because its decision-making — otherwise lawful—has been tainted by anti-union animus, an attempt to avoid its statutory obligations, or a desire to undermine the exercise of its employees' statutory rights. The cases are legion, and each, to some extent, turns on its own facts. It will be sufficient in our view, to refer briefly to several cases which, in various ways, resemble the instant one. As will become apparent, the situation here is by no means novel. Several previous Board decisions have involved business decisions not unlike those currently before us.

28. In *Academy of Medicine*, [1977] OLRB Rep. December 783, the Board found that an employer's decision to close its telephone answering service (one of a variety of services it provided to its clientele) 'was motivated in whole or in substantial part by anti-union considerations' and was therefore an unfair labour practice. In that case, the employer, as it said it would, shut down a part of its operation because its employees had decided to join a trade union and participate in collective bargaining. In *Humpty Dumpty Foods Limited*, [1977] OLRB Rep. July 401, the Board found that an employer's decision to transfer its warehouse operation beyond the scope of the union's recognition and set up remote satellite warehouses to serve the same market was an unlawful lockout. It was 'motivated by a desire to compel or induce its employees to refrain from exercising rights or privileges under the Act'. In *Humber College of Applied Arts and Technology*, [1979] OLRB Rep. June 520, the Board found that an employer's decision to subcontract the work of its security guards was unlawful because its purpose was 'to insulate itself from the natural and inevitable consequences of the exercise by the security guards of their right to strike'. It was an attempt by the employer to avoid its obligation to bargain, and abrogate the employees' right to participate in the bargaining process. In *Consolidated Sand and Gravel*, [1978] OLRB Rep. March 264, a decision by a quarry operator to switch from a system of direct hiring of its drivers to one in which the drivers were assigned through a broker was found to be actuated by anti-union animus and 'an attempt to ensure that the respondent would not be required to deal with its employees through a trade union'. In *Westinghouse Canada Limited* (*supra*), the Board found that a partial plant closure and relocation was motivated by anti-union considerations, and amounted to an unlawful refusal to continue to employ a number of its employees. In *Doral Construction Limited*, [1980] OLRB Rep. May 693, an employer's decision to subcontract the maintenance and security work performed by some of its employees, was found to have been induced, in part, by their decision to opt for trade union representation. The resulting decision to terminate the employees was held to be a breach of section 58(a) [now section 66(a) of the Act]. Finally, in *Dr. Hillers Peppermit Canada Limited*, [1979] OLRB Rep. May 375, an employer in the construction industry—where subcontracting is a common and accepted practice, was found to have engaged in a particular subcontract to impede its own employees in



their efforts to join a union and bargain collectively. In each of these cases, therefore, an employer's 'business' decisions were found to be illegal because they were motivated, in whole or in part, by a desire to avoid its statutory obligations, or frustrate the exercise of its employees' statutory rights. (See also: *C.A.L.E.A. and North Canada Air Ltd.*, [1979] 3 Can L.R.B.R. 239.)"

As indicated above, similar considerations have led us to conclude in the instant case that anti-union animus was at least part of the respondent's motivation for substantially increasing its use of workers provided by employment agencies following the certification of the union in February of 1980, and also for the reduction of the hours of work of such workers to less than 24 hours per week following the filing of the grievance. Such action was taken by the respondent at least in part for the purpose of continuing to deprive those employees of union representation and of the protection and benefits of the collective agreement.

47. As an alternative to his argument that the employment agency workers were not employed by K Mart, counsel for the respondent submitted that the union was estopped from claiming any relief in respect of them. In support of that contention, he referred the Board to a number of judicial and administrative authorities.

48. The doctrine of estoppel is succinctly summarized in the following passage from Brown and Beatty, *Canadian Labour Arbitration* (Agincourt: Canada Law Book Limited, 1977) at paragraph 2:2210:

"The concept of promissory estoppel is well established at common law and has been expressed in the following way:

The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word ....

Thus, the essentials of estoppel are: a finding that there was a representation by words or conduct intended to be relied on by the party to which it was directed; some reliance in the form of some action or inaction; and detriment resulting therefrom ...."

(See also *Canadian National Railway Co. et al. v. Beatty et al.* (1981), 34 O.R. (2d) 375 (Div. Ct.); *Vanbots Construction*, [1982] OLRB Rep. July 1086; *Comstock International*, [1982] OLRB Rep. June 852; *Sinclair Welding Limited*, [1981] OLRB Rep. March 331, and *The Master Insulators' Association of Ontario, Incorporated*, [1979] OLRB Rep.

Sept. 877.) It is firmly established that acquiescence or inaction can have the effect of a "representation": see *Re Consolidated-Bathurst Packaging Ltd. and International Woodworkers of America, Local 2-242* (1982), 6 L.A.C. (2d) 30 (MacDowell), and *Re City of Penticton and C.U.P.E. Local 608* (1978), 18 L.A.C. (2d) 307 (B.C.L.R.B.).

49. Counsel for the respondent submitted that the union's withdrawal of its collective agreement proposals concerning temporary employees estopped the union from asserting at any time during the term of that agreement that temporary employees are covered by it. However, as contended by counsel for the union, those proposals were made and withdrawn at a time when the respondent was using relatively few temporary employees for relatively short periods of time. The abandonment of those proposals cannot be taken to have given the respondent carte blanche to virtually freeze the size of the bargaining unit by using unlimited numbers of agency workers on a year-round basis to handle work that would otherwise be performed by regular full-time employees of the respondent. Accordingly, under the circumstances we are not persuaded that the union's conduct during negotiations estopped it from asserting the claims contained in the grievance of September 17, 1982 and in the present proceedings.

50. It was also submitted on behalf of the respondent that the union's inaction in the face of clear knowledge concerning the respondent's vastly increased use of temporary employees during 1981 and 1982 gave rise to an estoppel. In support of that submission, counsel noted that Mr. Priestley and other union stewards worked side by side with a number of workers supplied by agencies over long periods of time without giving management any indication whatever that the use of such personnel was unacceptable to the union at any time prior to September 17, 1982 when the grievance was filed. He further contended that in reliance upon the union's tacit approval of its actions, the respondent utilized such employees without applying its usual screening and probationary processes, and that in determining the number of such workers that it could afford to use at the Centre, the respondent proceeded on the assumption that the hourly rate paid to their respective employment agencies would be the only expense involved. Thus, counsel for the respondent submitted that his client had relied upon the union's acquiescence to its detriment. He also argued, in the alternative, that "promissory estoppel" requires no detrimental reliance.

51. It is well established that the doctrine of estoppel cannot be invoked to prevent the operation of a public statute such as the *Labour Relations Act*: see, for example, *Culliton Brothers Limited*, [1982] O.L.R.B. Rep. March 357, at paragraph 31, and the authorities cited therein. Thus, it is doubtful that the doctrine of estoppel can have any legitimate bearing on the disposition of this unfair labour practice complaint. However, quite apart from estoppel, the Board has a discretion under section 89 of the Act to take into account in fashioning an appropriate remedy such factors as acquiescence and undue delay. (See, for example, *Irving Posluns Sportswear*, [1979] O.L.R.B. Rep. Oct. 986.) Since the union has not provided an adequate explanation for its failure to launch any complaint, grievance, or other proceedings prior to the September 17, 1982 grievance in respect of the respondent's extensive use of agency employees at the Centre, the Board is of the view that it would not be appropriate to grant any relief to the complainant in respect of the period prior to that date.

52. The Board therefore declares that the respondent has contravened sections 64, 66 and 80(1) of the Act, and hereby orders that the respondent:

(1) reinstate Lutchman Persaud, Leslie Bodi, Paul Miller, Stephen Rank, Gery O'Donnell, and Bruce James forthwith, and compensate them for all lost wages and benefits sustained by them after September 17, 1983, through the respondent's violations of the Act;

(2) pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in Practice Note 13, dated September 8, 1980; and

(3) post copies of the attached notice marked "Appendix", after being duly signed by an authorized representative of the respondent, in conspicuous places at its distribution centre on Torbram Road, where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material.

53. The Board remains seized of this matter in the event that a dispute arises concerning the implementation of the Board's order.

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**0504-82-R** United Steelworkers of America, Applicant, v. **Lilo-Rail of Canada Limited** and Modern Plating Company Limited, Respondent, v. Group of Employees, Objectors.

**Charges - Membership Evidence - Practice and Procedure - Non-pay allegation relating to one card - Board relying on documentary evidence of card where unable to choose between conflicting evidence as to payment - Allegation not established**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members W. F. Wightman and B. Armstrong.

**APPEARANCES:** *Brian Shell, Gerry Barr and George Teal for the applicant; R. A. Werry for the respondent; no one appearing for the objectors.*

**DECISION OF THE BOARD;** May 2, 1983

1. The applicant herein was certified by the Board on July 26th, 1982. The Board was advised by letter from the respondent's solicitors that an employee of the respondent, Ian Bradley, had informed the respondent that he had joined the applicant without paying the \$1.00 membership fee. The Board made its customary initial inquiry into the allegation and determined that a hearing should be held for the purpose of receiving the evidence and representations of the parties with respect to that allegation.

2. A hearing for that purpose was held on April 11th, 1983, at which the Board inquired into the circumstances surrounding the allegation that Ian Bradley had not made any payment in respect of his application for membership in the applicant. Bradley's application for membership was amongst the membership documents filed by the



**Appendix**  
**The Labour Relations Act**

# NOTICE TO EMPLOYEES

**Posted by Order of the Ontario Labour Relations Board**

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE UNION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY SUBSTANTIALLY INCREASING OUR USE OF WORKERS SUPPLIED BY EMPLOYMENT AGENCIES FOLLOWING THE CERTIFICATION OF THE UNION, BY REFUSING TO CONTINUE TO EMPLOY STEPHEN RANK, GERY O'DONNELL, AND LUTCHMAN PERSAUD, AND BY REDUCING THE HOURS OF WORK OF PAUL MILLER, BRUCE JAMES, LESLIE BODI AND LUTCHMAN PERSAUD.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN, AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION,
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
- TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THOSE RIGHTS.

WE WILL NOT DISMISS, REDUCE THE WORKING HOURS OF, OR OTHERWISE PENALIZE ANY PERSON BECAUSE HE HAS SIGNED OR FILED A GRIEVANCE, OR EXERCISED ANY OTHER RIGHTS UNDER THE LABOUR RELATIONS ACT.

WE WILL REINSTATE LUTCHMAN PERSAUD, LESLIE BODI, PAUL MILLER, STEPHEN RANK, GERY O'DONNELL, AND BRUCE JAMES FORTHWITH, AND WILL COMPENSATE THEM FOR ALL LOST WAGES AND OTHER BENEFITS, PLUS INTEREST.

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K MART CANADA LIMITED  
PER: (AUTHORIZED REPRESENTATIVE)

**This is an official notice of the Board and must not be removed or defaced.**

**This notice must remain posted for 60 consecutive working days.**

DATED this 2ND day of MAY, 19 83.



applicant in support of its application. The name of the collector appearing on the card is D. McMullen. Bradley, Donald McMullen and Gerry Barr, a staff representative for the applicant testified at the hearing. Neither Bradley nor McMullen were employees of the respondent at the time of this hearing.

3. The Board's findings of fact herein reflect its assessment of the demeanor of the witnesses, the consistency of their evidence, their ability to recall the events about which they were testifying, the firmness of their recall and their ability to resist the influence of self-interest to modify their recollections.

4. Bradley recalls the union campaign as having taken place in the second week of June 1982, about one week after his employment began. He told the Board that he was approached at his work bench by McMullen on a Thursday. He did not remember the date, but thought it was June 11th. After talking with McMullen, he agreed to sign a card and was told that he would have to pay \$1.00. He signed the card but states that he did not pay the dollar then or later.

5. He gave that testimony without seeing his membership application card. When he was shown the card which purported to bear his signature, he identified it as the one he had signed. The obverse of the card is divided horizontally into three sections: the top section is the application for membership; the middle section is the acknowledgment of the person applying for membership that he has paid "... \$1.00 on account of initiation fees in the United Steel Workers of America."; and the bottom section is for the certification of the collector that he received \$1.00 "... from the person whose signature appears above.". At the bottom of each section there is space to the left for the date and to the right for a signature. Bradley signed and dated the top and middle sections; that is the application for membership and the acknowledgement that he paid \$1.00. The date spaces are filled in as "06/11" for the month and day and "82" for the year. Bradley said that meant June 11, 1982. The third date space is completed in the same manner, but Bradley was uncertain if it was his writing. The style of the date, the writing and McMullen's testimony that all three dates were on the card when he first noticed the dates and that the writing was not his own, satisfies the Board that the third date was also written in by Bradley. He later acknowledged that June 11th, 1982 was a Friday but he still recalled that it was a Thursday when he signed the card because at the time he was attending religious classes on Thursday evenings and also meeting with his religious mentor. He testified that he discussed the union with his mentor on the evening of the same day that he signed the card. As a result of that discussion, he claims that he concluded that he had acted contrary to his religion when he signed the card. He testified that he atoned fully for his error by signing a petition in opposition when he was asked to do so.

6. Bradley learned during the latter part of July that his membership card had been used to support the union's application. He testified that he was quite disturbed by that realization because he had not paid the dollar and he had signed a petition against the union as well. He told the Board that he eventually spoke to three management officials of the respondent. He thought that he had spoken to one of them in January 1983, another in February and the third one a few weeks before the Board's hearing of the instant issue. He could not remember what he told them or just when the conversations took place. Nor could he remember when he was served with a summons from the Board to attend at the hearing. The summons to witness was issued by the Board on March 18th.



7. McMullen's recollection of events is similar to Bradley's with respect to the fact that he did approach Bradley at his work bench about signing a union card on a Thursday; he did give Bradley a blank card when he indicated that he was prepared to sign one and McMullen did tell Bradley that it was necessary for him to pay \$1.00. The similarity ends there. McMullen claims that, when he informed Bradley of the requirement to pay \$1.00, Bradley told him that he had need that evening for the money which he had with him and would give him the dollar the next day. At this point McMullen retrieved the card. By then Bradley had filled in the information on the reverse of the card and had signed the obverse in the two places but had not filled in the dates. McMullen told the Board that he noticed the absence of dates because he had been advised by staff representatives of the applicant that one of the common faults with membership cards is the absence of dates. McMullen went back to his own work place and put the card into his tool box where he kept his supply of cards.

8. The next morning before McMullen had started his first job he encountered Bradley who told him that he had the dollar. McMullen was on his way to look at a job and did not have Bradley's card with him so he told Bradley that he would see him later in the day. After lunch, McMullen went to Bradley's work place, asked Bradley if he was sure he wanted to pay his dollar. When Bradley affirmed that he did, McMullen put the card with receipt attached on Bradley's bench, made out and signed the receipt portion, collected the dollar from Bradley, gave him the receipt and kept the card. He did not see Bradley fill in the dates on the card. McMullen put the dollar with another dollar he had collected earlier from another employee and put the card in his tool box. Later that evening, he turned over to Gerry Barr the cards and money which he had collected that day.

9. Barr asked McMullen two questions with respect to each card. First, did McMullen personally receive \$1.00 from the person who had signed the card? Second, was he aware of any irregularity with any of the cards? McMullen answered the first question affirmatively and the second negatively. He did not disclose to Barr the fact that he had collected the dollar from Bradley that day, while Bradley had signed the card the day prior. Bradley's was the only case in which McMullen had not collected a dollar at the same time as the employee signed a card. He canvassed employees on two days only, June 10th and 11th, the only days on which the campaign was carried out. The application was made on June 11th, 1982.

10. The payment of at least \$1.00 in respect of initiation fees or monthly dues of the trade union is one of the two criteria established by section 1(1)(l) of the *Labour Relations Act* for defining a member of that trade union. The section provides as follows:

1.-(1) In this Act,

(1) "member", when used with reference to a trade union, includes a person who,

(i) has applied for membership in the trade union, and

(ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and “membership” has a corresponding meaning.

The payment of at least \$1.00, being a statutory requirement, is critical to the authenticity of the membership document. The Board rejects cards which fail to disclose on their face payment of at least \$1.00 and will not accept viva voce evidence to correct such deficiencies because of the great reliance which the Board places on the membership cards, which strictly speaking are documentary hearsay, and, therefore, the requirement that such payment be shown on the face of the document is a substantive matter which goes to the very question of membership in the trade union. See the Board's decision in *Cooper-Weeks Limited*, [1969] OLRB Rep. No. 974. The showing of \$1.00 on the face of the card when it has not been paid, on the other hand, is an absolute untruth on its face and a serious fraud on the Board.

11. When the Board enquires into such alleged fraud and, as so often happens, finds itself faced with diametrically opposed evidence on the one hand from the collector and on the other hand from the person who signed the card, so that credibility is the only issue and there is nothing to choose between their evidence, the Board will usually give effect to the signed statement appearing on the membership and receipt card acknowledging payment of the dollar. See *The Watson Manufacturing Company of Paris Limited*, [1967] OLRB Rep. Dec. 862. McMullen testified in a very candid and forthright manner and there is nothing either in his evidence or demeanor as a witness which would cause the Board to disbelieve his evidence, including his evidence about when and how he collected \$1.00 from Bradley. Bradley's evidence that he did not pay the \$1.00 at the time he signed the card or at any time thereafter is diametrically opposite to McMullen's. Therefore, were the Board also to find Bradley's evidence credible, the Board would accept the documentary evidence of Bradley's card and find no doubt to be cast on the union's membership evidence.

12. In assessing the demeanor of the witnesses however, the Board prefers McMullen's evidence. While Bradley appeared to recall and recite with clarity the events surrounding his signing of the membership card, he had considerable difficulty recalling more recent events of equal importance to him. He told the Board that he was quite upset when he learned in July 1982 that the applicant had used his card, yet he could not recall the elementary details of what he told his employer's officials or when he spoke to them, the most recent of these events being, by his own account, a few weeks before the hearing. He could not remember when he was served with the summons to witness which was issued March 18th, less than four weeks before the hearing into the allegation raised by his statements to the respondent.

13. Consequently, the Board finds that the evidence does not support the allegation that Bradley did not pay \$1.00 on his own behalf in respect of an initiation fee of the United Steel Workers of America. in the result, the Board is satisfied that Bradley paid on his own behalf at least \$1.00 in respect of an initiation fee of the applicant trade union within the meaning of section 1(1)(1) of the *Labour Relations Act* and that the union's documentary evidence complies with the Act in all respects.

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**2426-82-R** Retail, Wholesale and Department Store Union, AFL:CIO:CLC, Applicant, v. **Lo Food Division of Lumsden Brothers Limited**, Respondent, v. Group of Employees, Objectors.

**Bargaining Unit - Certification - Petition - Whether unit restricted to street address -Petition initiated and circulated by head cashier with some managerial functions - Petition not accepted due to employee perception of management involvement**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

***APPEARANCES:** Gordon D. Reekie and George Ross for the applicant; E. L. Stringer, Q.C., Wm. Lumsden and T. Staffen for the respondent; Theresa Miner and Jeff Lemieux for the objectors.*

**DECISION OF R. O. MacDOWELL, VICE-CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; May 2, 1983**

1. The name of the respondent is amended to read: "Lo Food Division of Lumsden Brothers Limited".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. The parties were in substantial agreement as to the description of the unit of employees appropriate for collective bargaining and were content that, in accordance with the Board's usual practice, there should be a separate bargaining unit for full-time and part-time employees. The parties were in dispute, however, about the precise geographic parameters of the bargaining unit with the union taking the position that it should apply to all employees of the Lo Food Division of the respondent in Hamilton, and the employer submitting that it should be restricted to the street address of the single "Lo Food" outlet in question. The resolution of this dispute cannot effect the disposition of this certification application because, regardless of which bargaining unit description is accepted, the employee complement remains the same.
5. The respondent's concern is not with the existing certification application, but rather the future problems which could arise if the union's proposed bargaining unit is accepted. Although there is currently only one "Lo Food" outlet in the City of Hamilton, that may not always be the case. Lo Food is a retail operation, but Lumsden Brothers Limited also has a wholesale, cash and carry food operation in Hamilton where access depends upon a form of membership. At the present time there is no interchange of employees, and no functional coherence or interdependence between the two operations. However, the employer was concerned that if it should decide at some time in the future to convert the cash and carry operation in a "low food" store, it might fall automatically within the scope of the Board certificate or any subsequent collective agreement based upon it. It was acknowledged, however, that there were no firm plans for such



conversion. Counsel advised the Board that it could be put no higher than that such change was within the employer's contemplation.

6. We are not unsympathetic to the employer's concerns, but are reluctant to base a bargaining unit determination on the basis of circumstances which at the present time are entirely speculative. Even if at some time in the future the suggested conversion takes place, it is by no means clear that there will be any collective bargaining ramifications. That will very much depend upon the way in which such transaction is structured, as well as the legal framework through which business is carried on, and it does not necessarily follow that bargaining rights would automatically be extended.

7. On the basis of the material before the Board and pursuant to section 6 of the *Labour Relations Act*, the Board finds the following two units to be units of employees appropriate for collective bargaining:

#### Full-Time Unit

"All employees of the respondent in the City of Hamilton, Ontario, save and except store manager, persons above the rank of store manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period."

#### Part-Time Unit

"All employees of the respondent in the City of Hamilton, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except store manager and persons above the rank of store manager."

8. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the part-time bargaining unit, at the time the application was made, were members of the applicant on March 7, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

9. A certificate will issue to the applicant with respect to the part-time bargaining unit.

10. In support of its application for certification, the trade union also filed documentary evidence of membership on behalf of more than fifty-five per cent of the employees of the respondent in the full-time bargaining unit. This documentary evidence took the form of membership cards, which include a combination application for membership and an attached receipt. These cards are each signed by the subject employee, and the receipts are countersigned by a witness ("the collector") and indicate that a payment of one dollar has been made to the union in respect of its membership fees. The documentary evidence is supported by a properly completed Form 9, Statutory Declaration, attesting to its regularity and sufficiency. There is no allegation of any

irregularity in the form of this documentary evidence, nor is there any alleged impropriety in the manner in which it was solicited. Its form and contents are consistent with the requirements of section 1(1)(l) of the Act and, as well, it meets the form and time limits prescribed pursuant to section 103(2)(j) of the Act. This documentary evidence, standing by itself, demonstrates that the union has a level of "membership support" well in excess of that required by section 7(2) of the Act, for certification without recourse to a representation vote.

11. There was also filed with the Board a "statement of desire" or "petition" signed by a number of employees indicating that they wish to oppose the certification of the applicant. This petition included the names of certain individuals who had previously signed membership cards and paid one dollar in respect of membership fees, and, therefore, were "members" of the union within the meaning of section 1(1)(l) of the Act. These individuals had had a purported change of heart, and now allegedly no longer wish to support the applicant's certification. It was apparent that if the change of heart was a voluntary one so that the union's documentary evidence may not be fully reflective of the employees' subsequent or current wishes, the Board, in accordance with its usual practice, would exercise its discretion to order a representation vote to resolve the question of the applicant's certification. This is the course of action urged upon us by both the respondent employer and the employee objectors.

12. The system of certification prescribed in Ontario by the *Labour Relations Act* rests primarily upon an assessment of the union's membership support based upon an examination of its documentary evidence of membership. That is the way it has been for more than thirty years, and doubts about how the Board should go about its task have frequently been resolved by amending the statute (as, for example, to resolve the question of what is a "union member" and the "question" the Board was to ask itself in this regard which prompted section 1(1)(l). There is now an elaborate statutory and regulatory framework governing union membership evidence. Of course, over the same period there has also been an active and ongoing debate about the utility of representation votes as an alternative (and, some would argue, better) means of testing union support; but, to date, the Legislature has been disposed to stick with the established scheme - as have most other Canadian jurisdictions. Representation votes are a residual mechanism resorted to where the union cannot demonstrate a "clear majority" (i.e., more than fifty-five per cent) or where, in the Board's discretion, a representation vote should be held in the particular circumstances of a case. On the other hand, neither the Legislature nor the Board has taken a myopic view of the realities of the situation. Employees can and do change their minds. While in some jurisdictions the statute precludes or inhibits such expressions (British Columbia, Canada) so that certification is based solely on membership cards, and in others they are irrelevant because the preferred method of testing employee wishes is a representation vote, Ontario has evolved a middle position recognizing the validity of union membership cards, but retaining some flexibility to seek the confirmatory evidence of a representation vote where employees have put before the Board a timely "petition" or other document indicating a change of heart. Petitions too have been part of the certification process for decades.

13. "Statements of desire" (see Form 6), usually in the form of a "petition", are not regulated by the Act as directly or precisely as union membership evidence. There is no statutory definition equivalent to section 1(1)(l), nor is there any requirement for a monetary payment, in the nature of consideration confirming the act of signing. There is

no statutory declaration similar to Form 9 attesting to the regularity and sufficiency of the membership evidence. Nevertheless, the existence of such statements appears to be contemplated by section 103(2)(j) of the Act and Rule 73 of the Rules of Practice. And, in any event, as we have already noted, the Board has a long-established practice of accepting such petitions and exercising its discretion to order a representation vote where: the petition is voluntary (as evidenced by testimony adduced in accordance with Rule 73 of the Rules of Practice), and the petition contains the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt whether these “members” (in accordance with section 1(1)(l)) continue to support its certification. The Board must be satisfied, however, that when these union supporters sign the petition indicating an apparent change of heart, they were doing so voluntarily, and were not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer, or could result in reprisals.

14. It must be clear that the circulation of the petition is free from the actual or perceived influence of management. Often, as in the present case, a petition will be signed by employees who have indicated their support for the union only a short time before, and a natural question arises as to what prompted the change of heart. Moreover, while an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. Frequently, such petitions are openly circulated on or near the employer’s premises, or during working hours, by employees who, in their opposition to the union, will be objectively aligned in interest with their employer and may be so perceived. In these circumstances, an employee may sign a petition because he fears that a refusal to do so will expose his support for the union and will be made known to his employer. Similarly, an employee may be motivated to sign because of conduct which suggests that continued support for the union will result in the loss of his job or other adverse employment consequences. In neither case can one regard his signing the petition as being truly voluntary – although, of course, the mere identity of interest between the employer and the objecting employees is obviously not sufficient in itself to link the petition with management in the minds of reasonable employees, or undermine the reliability of the signatures placed on it. There must be more than that, and each case must be considered on its own merits.

15. It is for this reason that the Board undertakes the inquiry contemplated by Rule 73(5) of the Rules of Practice, in order to satisfy itself from the circumstances of the origination, preparation, and circulation of the petition, that the document truly represents the voluntary wishes of those who signed it. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043, the Board discussed the nature of this inquiry in a long passage to which we might usefully refer:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the “sudden change of heart” by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The



Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16,264 in the following terms:

"In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories."

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

Reference might also usefully be made to the following passage from *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387, wherein the Board has recently reaffirmed its approach to such employee statements.

Before reviewing each of these issues it is useful to understand the general legal and policy background against which petitions are considered by this Board. There is usually and naturally an identity of interest between an employer and those of his employees interested in opposing an applicant trade union. In this context the circulation of a statement of desire involve petitioners approaching their fellow employees to solicit support. Understandably, an employee so approached may worry or feel anxious that his refusal to sign such a petition will become known to his employer given this natural interest employers have in employees opposing the trade union. But, this identity in interest between employer and opposing employees, standing alone, has never been viewed by this Board as undermining the reliability of signatures places on a circulated petition. If this were

not so, a petition could never be found to be voluntary. On the other hand, this is not to say that a similarity in interest between employer and petitioners is irrelevant and, indeed, it is the reason why this Board subjects the origination and circulation of a statement of desire in opposition to an application for certification to considerable scrutiny. There is an onus on those employees who present the documentary evidence to the Board to demonstrate that the signatures contained therein constitute a voluntary expression of the wishes of those employees who on recent and earlier occasion joined the applicant trade union. It is in this context that the Board, in the often cited *Pigott Motors (1961) Ltd.* case, 63 CLLC ¶16,264, made the following observations:

• • •

41. Actions by either the employees opposing the trade union or the employer can adversely affect the reliability of a statement of desire. Direct and open support by an employer will obviously suggest a relationship between the employer and the petitioners that would reasonably cause anxiety in the minds of employees approached by the petitioners. Therefore, in such circumstances, it would be just as reasonable to infer that the employees signed the document to conceal their support for the trade union as it would be to conclude that they signed voluntarily. Where this is the case, the Board usually takes the view that the petitioners have not satisfied the onus on them and the statement of desire is dismissed as an unreliable indicator of the true wishes of the employees. Similarly, actions by the petitioners without support of the employer can equally destroy the reliability of a statement of desire. Circulating a document in the presence of foremen or representations clearly indicating support by the employer can produce the same anxiety in the minds of employees whose signatures are solicited and thus prompt the Board to respond in a similar fashion.

16. The petition in the instant case was prepared and circulated by Theresa Miner, the respondent's "head cashier". Ms. Miner knew nothing about the trade union before the Form 6, Notice to Employees, was received by the respondent and her first action upon learning about it was to approach the store manager to find out what could be done to oppose it. According to Ms. Miner, the store manager advised her that he could not discuss the matter so she phoned the Labour Relations Board for clarification. Someone at the Board advised her that in response to the Form 6 Notice, an individual or group of individuals could file a statement in opposition to the union's certification in the form and within the time set out in the Notice.

17. Ms. Miner then set about talking to employees to determine who might be for or against the union and who might be interested in signing her petition in opposition. It was Ms. Miner who drafted the petition document and played a pivotal role in its circulation. According to the evidence before us, this role was well known to all of the employees.

18. Ms. Miner's position in the store and responsibilities are somewhat different from that of other employees. They are paid on an hourly basis, while she is paid a salary. She makes up the cashiers' weekly schedule, and if they have any customer problems, they are referred to her. Ordinarily, she does not work at the cash registers. Seventy-five per cent of her time is spent in a small office area on the main floor of the store from which she can oversee the cashiers' activities. She delivers cash to and from their work stations, takes care of deposits, Brinks' deliveries, and invoices, and keeps track of the cashiers' time for payroll purposes. If an employee wishes to have time off, she/he advises Ms. Miner, who juggles the schedule accordingly. Ms. Miner testified that she has never had any difficulty accommodating these employee requests, and has been able to do so without reference to higher authority.

19. Ms. Miner also has a role in the imposition of employee discipline. That discipline is meted out in accordance with an established employee policy which, in Ms. Miner's case, relates to cash shortages for which the cashiers are held responsible. Discipline is imposed on a progressive basis, beginning with a warning for the first infraction, a one-day suspension for the second, a three-day suspension for the third, and ultimately a discharge. Employees are allowed a certain number of discrepancies within a defined time period. It is Ms. Miner who scrutinizes the situation in the first instance and determines whether a disciplinary notice is warranted. The action which she initiates is then brought to the store manager's attention and, in the ordinary course, is endorsed by him. In cross-examination (by both the employer and the union), Ms. Miner characterized her role as initiating the disciplinary action. According to Ms. Miner, the store manager has never failed to endorse such "recommendation".

20. The evidence indicates that Ms. Miner may also have a peripheral or participatory role in the hiring and termination of employees. Jeff Lemieux testified that he had contact with Ms. Miner at the time he was hired, turned in his job application to her, and assumed that it was Ms. Miner who checked his references prior to his actual hiring. There is no indication that the plant manager had any role in this process. Similarly, Ms. Miner told the Board about a situation in which one of the cashiers had an unsatisfactory attendance record and was told by Ms. Miner that she would have to "straighten up her act". Ms. Miner and the store manager had previously discussed the situation and how it should be dealt with, and both were present when the employee indicated that she intended to give notice of her termination. Somewhat later, the employee had a change of heart and approached Ms. Miner seeking reinstatement. Ms. Miner, however, was unwilling to accept that revocation and on consultation with the store manager, it was decided that the respondent should not do so.

21. There is no evidence that Gerry Hogan, the store manager, has been involved in the preparation of Ms. Miner's petition or encouraged employees to support it. On the contrary, the evidence is that he was away from the store throughout the process. The document was actually signed during breaks - in some cases, at least, in a restaurant across the street from the store. On the other hand, what is Ms. Miner's status and how would a reasonable employee consider an approach by her to sign the petition? It is evident from her duties and responsibilities that she is not an employee like the others, but has certain supervisory, monitoring, and admonitory functions more akin to that of a "foreman" or first level supervisor. Indeed, it could be argued that she exercises managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act*, and whether or not that argument would be successful, a reasonable employee could



certainly regard Ms. Miner as part of the management structure or at least having a special relationship with the store manager. Moreover, during her discussions with the employees, she adverted to numerous changes which were likely to follow the union's certification, including the introduction of more formal and rigid job descriptions, and perhaps even the closing of the store. Were this idle speculation by "rank and file" employees with no special status or relationship with management, one could not attach much significance to it. However, where it comes from someone who, at the very least, has been a conduit to the manager and works closely with him *inter alia* in respect of personnel matters, including discipline, we have much more difficulty concluding that the purported second thoughts expressed in the employee petition express a truly voluntary change of heart as opposed to a concern that a failure to sign the petition would reveal the depth of their support for the union and could expose them subsequently to adverse employment consequences. And this is so even if the extent of Ms. Miner's authority over her fellow employees does not rise to the level which would justify her exclusion from the bargaining unit under section 1(3)(b) of the Act.

22. In this case, the Board has before it documentary evidence of union membership about which there is no question. The Board also has before it a petition document containing the signatures of certain union members purporting to signify their opposition, but which originated in circumstances which cast real doubt upon the "voluntariness" of that purported change of heart. In all the circumstances, the Board has determined that it should give effect and weight to the union membership evidence and certify the applicant without recourse to a representation vote.

23. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the full-time bargaining unit, at the time the application was made, were members of the applicant on March 7, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

24. A certificate will issue to the applicant with respect to the full-time bargaining unit.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. In this application for certification, Ms. Theresa Miner, the head cashier at the employer's store, has filed a statement of desire containing the signatures of six employees. The statement reads:

We the undersigned are employees of Lofood, 1015 Barton St. E., Hamilton Ont. We are petitioning to the Ontario Labour Relations Board against a union. We feel the right should be given to us for a secret ballot on the issue, and to the other employees.

2. Ms. Miner first learned about filing a statement of desire or petition when she read a notice on green paper (the "green sheet") which had been sent by the Board to her employer. This is Form 6, which is prepared by the Board and is headed "Notice to Employees of Application for Certification and of Hearing". The first paragraph on the form reads:

TAKE NOTICE that the applicant, on February 24th, 1983, made an application to the Ontario Labour Relations Board for certification as bargaining agent of employees of Lo Foods Limited in the following bargaining unit claimed by the applicant to be appropriate:

"All employees of the respondent at Hamilton, save and except store manager and persons above the rank of store manager."

The fourth paragraph reads:

Any employee or group of employees affected by the application and desiring to make representations to the Board in opposition to this application must send to the Board a statement in writing of such desire, which shall,

- (a) contain the return mailing address of the employee or representative of a group of employees;
- (b) contain the name of the employer concerned; and
- (c) be signed by the employee or each member of a group of employees.

3. On the same day she read the green sheet, Ms. Miner also called the Board and asked what she could do. She said she was told about a petition and to have it mailed by registered mail no later than March 7, 1983.

4. Ms. Miner followed the instructions on the green sheet and the advice received in her call, to the letter. But for her position as head cashier at the store the statement of desire would be voluntary and the Board would order a vote. The decision of the majority holds that the petition is not voluntary because Ms. Miner would be perceived by other employees to be management and "that a failure to sign the petition would reveal the depth of their support for the union and could expose them subsequently to adverse employment consequences". There is not a scrap of evidence in this case to support that presumption by the majority. No doubt Ms. Miner will be confused, perplexed and, perhaps, feel that she and the others who signed the petition have been treated unfairly.

5. After all, she can say, the Form 6 sent by the Board does not say only certain employees can solicit and file statements of desire. And that same form says that she is considered by the union to be an employee who would become a member of the bargaining unit. And, at the hearing of this matter, the union did not retreat from that position; rather, the union simply argued that she was too close to management for her petition to be voluntary.

6. Now, as counsel for the employer pointed out, the applicant union has great experience with applications of this sort and yet it asks for a bargaining unit which excludes only the store manager. With respect to the petition though, it wants Ms. Miner to *not* be treated as an employee in the bargaining unit. It wants to have it both ways.

7. Ms. Miner could have obtained further information about petitions from the

Board in the form of a written booklet and a pamphlet. Unfortunately, she would have found no information in the material which would warn her that she was precluded from soliciting a petition, in spite of the wording on the green sheet.

8. There is one further unfortunate aspect of this case – other employees who had a bona fide change of heart have their wishes disregarded because the wrong employee took up the petition. Together with Ms. Miner they walk blithely into the same mine field.

9. I think it fair to say, paraphrasing the words of Dean Arthurs, that in this case the employees have been led out on a limb and then had it sawn off behind them. And the same principles of fairness are applicable as in an estoppel situation.

10. The decision of the majority would be more readily accepted if it had the effect of making the petition dispositive of whether or not the union is certified. Since only a secret ballot can result from finding the petition to be “voluntary”, we could order a notice posted in the store stating that it was improper (in the Board’s view) for Ms. Miner to have originated the petition, and conduct a vote in such a manner that the employer will have no way of ever determining how any of the employees voted. Or, we could order a re-posting of Form 6 and set a new terminal date now that the employees realize that Form 6 does not mean what it says. In any event, a vote should be held in these circumstances. Then we would know what the employees want.

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**0081-83-M** Labourers’ International Union of North America, Local 506, Applicant, v. **Metropolitan Toronto House Wreckers’ Association**, Respondent.

**Construction Industry Grievance – Long standing practice of treating welfare contribution amount to be in addition to wage rate – Burden on employer to be explicit if practice to be changed**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members J. Wilson and S. Cooke.

**APPEARANCES:** *Chris G. Paliare, Gilbert Cragg and Peter Hitchen for the applicant; R. M. Parry, Bill Greenspoon and Fred Fink for the respondent.*

**DECISION OF THE BOARD;** May 19, 1983

1. This is the referral of a grievance to the Board pursuant to the provisions of section 124 of the Labour Relations Act.

2. The case is a typical one for arbitration, in the sense that it simply involves the interpretation of the parties’ collective agreement. What is atypical about it, however, is the form in which the “collective agreement” has been presented to the Board. The dispute arose in the first paycheques issued under the terms of the new settlement and prior to the execution in long form of a “formal” collective agreement. Indeed, it quickly



became clear to the parties, as it has to the Board, that a different view exists on the respective sides as to precisely what was agreed to. The "settlement" did, however, bring an end to a long, debilitating strike, and neither side has taken the position that no collective agreement is now in operation. Rather, the parties have drawn up and signed a short-form Memorandum of Settlement incorporating the various terms of settlement to the extent that these had, at various points, been reduced to writing. The one-page Memorandum reads:

### MEMORANDUM OF SETTLEMENT

Between:

The Metropolitan Toronto House Wreckers Association

-and-

The Labourers' International Union of North America, Local 506

Whereas the parties hereto have negotiated a full and binding settlement of a renewal collective agreement, the parties hereto agree to the following terms:

1. All items previously agreed to and settled;
2. All items as proposed by the Association to the Union by offer dated February 8, 1983, with the following exceptions or changes:

(a) Statutory Holidays and Vacation Pay

"Change to 10% Vacation Pay which is inclusive of Statutory Holiday Pay"

(b) Wages:

Effective on	
Ratification	\$ 8.60
Effective	
June 1/83	8.90
Effective	
December 1/83	9.60
Effective	
March 1/84	9.75
Effective	
May 1/84	10.00
Effective	
June 1/84	10.10*

\* Includes 10¢ hour pension triggered June 1/84 at the option of the Union

3. The Collective Agreement shall become effective on March 7, 1983 and shall remain in full force and effect until July 1, 1984.
4. The parties hereto agree that this Memorandum of Settlement has been fully ratified and endorsed by both parties hereto and constitutes a binding agreement.

Dated at Toronto, this 8th day of April 1983.

For the Association

For the Local 506

(Signed)

(Signed)

This Memorandum together with the items referentially incorporated accordingly make up the "collective agreement" which, the parties agreed, the Board would be asked to interpret. Having said that, however, it should be noted that the employer takes the position that the "collective agreement" is silent on the matter in dispute, and that the Board accordingly has no alternative but to dismiss the grievance.

3. The issue in dispute concerns the relationship between the basic hourly wage rate and the contributions to the employees' welfare fund. The Welfare provision in Schedule A of the expired agreement reads:

#### WELFARE AND PENSION

It is agreed that the established Labourers' Union Local 506, (Industrial Division) Employee Benefit Trust shall continue and effective July 1st, 1980, the Employer shall pay an amount of twenty-five (.25¢) per hour earned by each employee covered by this agreement. Such monies shall be entered on a form as designated by the Trustees from time to time and remitted directly to the said Welfare Fund by the fifteenth (15th) of the month following the month for which contributions are made. At no time shall the contributions be paid directly to the employee.

If payment is over thirty (30) days late, interest at one (1%) per cent per month shall be paid from the due date provided the Employer is given five (5) days after notice to correct such delinquency.

Up until the first pay period following the most recent settlement, there had never been any dispute between the respondent and Local 506 as to what the relationship between the wage rate and the welfare payment was. Local 506 members received the full hourly rate specified in the agreement (\$8.05 an hour), and the employer contributed, on top of that, an additional 25 cents an hour to the welfare fund. This relationship existed under earlier collective agreements as well, going back as far as the inception of the welfare benefit in 1975.

4. The basic wage rate at the end of the predecessor agreement was, as noted, \$8.05 an hour. The final time the bargaining committees met face to face (being February 8, 1983), the employers tabled a wage proposal which read:

## Wages

Effective on	
Ratification	\$8.35 hour
Effective	
June 1/83	8.65 hour
Effective	
December 1/83	9.45 hour
Effective	
March 1/84	9.75 hour

This meant, to all concerned, an increase of \$1.70 an hour for the period ending April 30, 1984. There had never been any proposal from the employers to eliminate or in any way cut back the 25¢ welfare fund contribution, and both of the employers' witnesses who testified before the Board acknowledged that their \$1.70/hour proposal on February 8th was *exclusive* of their 25¢ welfare contribution. The meeting broke off with a counter-proposal from the union that included a wage increase of \$2.75 an hour over the two-year period.

5. A month later, on March 7th, 1983, the parties reached a settlement on an employer wage offer as follows:

Ratification	\$ 8.60	.55¢
June 1st/83	8.90	.30
Dec. 1st/83	9.60	.70
March 1st/84	9.75	.15
May 1st/84	10.00	.25
June 1st/84	10.10	.10
		2.05

10% Vacation

Pay

Expiration Date: July 1st/84

This again represented an increase in the hourly wage rate of \$1.70 an hour for the period ending April 30, 1984, but with a total of 25 cents taken from increments 3 and 4 and moved to the front of the contract. As well, the employers had offered an additional 35¢ an hour increase for a contract extension of 2 months. Both sides ratified the deal, and the strike ended. But when employees received their first paycheque after the strike, they found that the employers, instead of paying the full \$8.60 an hour referred to in the settlement, were paying only \$8.35 an hour, and contributing the other 25 cents to the employees' welfare fund. The employer witnesses acknowledge that no mention whatever was made of the handling of the welfare payment in the final talks leading to the settlement, but nevertheless take the position that, for the first time, the end rate specified for Local 506 members was to be *inclusive* of the 25¢ welfare contribution. There had never been any proposal put forward to reduce or eliminate the employers' *separate* obligation to contribute 25 cents to the welfare fund, and the position which the employers now take appears wholly inconsistent with the plain words of the proposal



which they tabled for ratification on March 7. To give their position any credence at all, the background to this final settlement document must be expanded upon.

6. The parties began negotiations for the renewal of their collective agreement in the spring of 1982. The only proposal on the welfare contribution came from the union, and that was for an increase in the amount of the contribution from 25 to 50 cents per hour. The employers' association and the Labourers' District Council were both desirous of negotiating a single province-wide demolition agreement to cover all Locals, and Local 506 agreed at this point to participate in the effort to do so. Those talks broke down, however, and Local 506 continued its negotiations with the Association on a local level, meaning for Board areas 8 and 18. The conciliation process was completed, and a lawful strike commenced in early January of 1983.

7. A number of developments then led to renewed efforts on all parts to conclude a province-wide agreement, culminating in a meeting on February 1, 1983. Local 506 participated initially in those talks, but during the course of the day made it clear that it wanted no part of the deal that was being worked out. As a result, at the end of the day a "provincial" agreement was concluded which *excluded* Local 506, as well as two other Locals by agreement. The basic hourly rate for Local 506 had been the benchmark rate for all discussions on a provincial agreement, and the "provincial" agreement signed that day by the Association and District Council struck an interim rate of \$8.25 an hour, pending a settlement for Local 506.

8. Negotiations between Local 506 and the Association then continued. On February 8th, the Association tabled the proposal already referred to, which included the wage increase of \$1.70 an hour to April 30, 1984. The Association's spokesman made it clear that this \$1.70 was a "package" offer, and the total increase that the employers could afford, and that anything else the union was looking for on benefits would have to come out of the \$1.70. Local 506's counter-proposal that day was nowhere close to that; it asked for a wage increase of \$2.75 an hour, plus other benefit improvements, including an increase in the employer's welfare contribution to 40 cents an hour. Once again, it should be noted that the employers' witnesses concede that the *existing* 25-cent-an-hour contribution was to have continued over and above the \$1.70 increase laid on the table that day.

9. The strike dragged on for another two or three weeks, and was having a ruinous effect on at least one of the major wrecking companies, Teperman's. Fred Fink of Teperman's testified that he agreed to see if a deal could be worked out through the medium of himself and John Stefanini, the Business Manager of the Labourers' Provincial District Council, whom Mr. Fink went to, he testified, as a personal friend. With the blessing of Peter Hitchen, the Business Representative of Local 506 in charge of the Local's negotiations with the Wreckers' Association, Mr. Stefanini began to explore with Mr. Fink the parameters of a settlement. Mr. Fink reported that his members could not go beyond the \$1.70 tabled by the employers on February 8th. Mr. Stefanini reported this back to Mr. Hitchen, and suggested the only way to get more money was to extend the length of the contract. Mr. Hitchen agreed with that approach, but added that more of the \$1.70 would have to be put at the front end of the contract.

10. Mr. Stefanini and Mr. Fink then worked out the deal shown above in paragraph 6. Mr. Fink asked Mr. Stefanini, "Is this a package deal", and Mr. Stefanini replied that it

was. There was also an increase in Vacation Pay agreed upon and, it appears, in Travel Time as well. The deal was relayed back to Mr. Hitchen, and, as Mr. Hitchen testified: "I recognized the \$1.70 was still there to April 30th, but it was re-arranged, with more at the front. Then there was some extra money added for extra term." Mr. Hitchen set up a meeting with the employers on the morning of March 7th to confirm in writing the numbers he had received from Mr. Stefanini. The offer was typed up and approved in the form shown in paragraph 6 and that afternoon the agreement was ratified.

11. The employers, unfortunately, had a different idea than the union as to what the deal was, based on the way that Mr. Fink explained it in seeking their approval. Mr. Fink's own interpretation was shaped by the fact that he had been involved in concluding the "provincial" agreement only weeks earlier. Other Locals in the province do, it would appear, have a different practice respecting the Welfare payment than does Local 506; i.e., the employer's contribution comes *off* the specified wage rate, rather than being in addition to it. This is reflected in the Welfare article of the "provincial" agreement, which contains language similar to Local 506's, but now has an *additional* clause which reads:

23.02 The established Welfare Plans of Local Unions' members of Council, shall be complied with as required herein provided that the total payment of wages, vacation pay, welfare, pension and training shall be equal to the total provided herein applicable to each Local Union and wages shall, if necessary, be adjusted to comply with this requirement.

This additional language was never put before Local 506 for its approval, and, as stated earlier, Local 506 withdrew from the provincial talks prior to the time that the agreement was signed. Local 506 is, quite properly, missing from the list of Locals on whose behalf the District Council entered into the "provincial" agreement. There is no dispute on Local 506's part that once this last "tie-in" matter is resolved, it is the intention of all parties that Local 506 become part of the provincial agreement, but as of this point in time there is absolutely nothing in that agreement which is binding on Local 506.

12. Mr. Fink, however, was influenced by that agreement when mediating with Mr. Stefanini, and by the practice of his company with other Locals, and appeared to believe he was putting Local 506 on the same footing by referring to his offer as a "package" deal. Given the practice with *Local 506*, however, and the clear acknowledgement that the figure of \$1.70 that was rejected by the union on February 8th was *in addition to* the existing Welfare payment, the onus was on the employers, through Mr. Fink, to be far more explicit if they were hoping to accomplish such a fundamental change in the meaning of their offer, and in the undisputed practice of the parties to that date. If the employers' interpretation were correct, it would have meant that the new offer for the period ending April 30, 1984, would have been 25 cents *less* than the \$1.70 an hour offer rejected on February 8th, with *no* additional money at the front end, and that the overall improvement in the offer for the union's members would be not 35 cents, but 10 cents, for two more months of term. On that interpretation, the Board finds Mr. Fink's testimony not surprising when he explained: "Originally we were looking at \$1.70. But, that wasn't accepted. When I saw \$2.05 'all in', I phoned the others and said: 'This is a great deal - we should sign'".

13. In the present context, reference to a "package" offer could not reasonably be

taken to include in its calculation money that the employer had already agreed to pay under the terms of the predecessor contract, and which had not been made an issue at the bargaining table. The fact that none of the Articles in Schedule A of the predecessor agreement were signed off tells us nothing: it is agreed that the "sign-off" process was applied to non-monetary articles only, and that Schedule A was never even discussed in the parties' review of the prior contract.

It will be recalled that the union still had on the table, at the time of the Fink-Stefanini discussions, a demand for an *increase* in the Welfare contribution. Mr. Stefanini's acceptance of the \$1.70 (\$2.05 for the extended term) as a "package" offer meant that any further demands for monetary *increases* on the table were gone. But it meant no more than that. The extrinsic evidence in this case has not helped the employer, and the Board must find that the union and its members are entitled to the full benefit of the wage rates spelled out in the final Memorandum of Settlement, without reduction to meet the employer's 25-cent-per-hour Welfare obligation (which, it is conceded, still exists).

14. Having regard to the foregoing, the Board:

- (a) declares that the Employers have violated the Collective Agreement and continue to violate the Agreement by failing to pay Local 506 members employed by them wages in the amounts set out in the Agreement, which wages are in addition to the Employer's obligation to remit twenty-five (25¢) cents per hour directly to the Welfare Fund as provided by the Agreement;
- (b) orders that the Employers cease and desist from continuing to violate the said Collective Agreement;
- (c) orders that the Employers represented by the Association compensate Local 506 members for all loss of wages from March 7, 1983, together with interest in accordance with Board Practice Note No. 13.

The Board will remain seized of this matter in the event that the question of *quantum* cannot be resolved.

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**1287-82-R** Labourers' International Union of North America, Local 183, Applicant, v. **Nu-West Development Corporation Ltd.**, Respondent.

**Bargaining Unit - Construction Industry - Employee - Whether persons performing clean-up work under employer's warranty construction employees - Held to be service employees and not construction labourers - Excluded from unit - Whether persons managerial or working foremen**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members  
J. Wilson and H. Kobryn.

**APPEARANCES:** *B. Fishbein and T. Pinto for the applicant; J. R. Hassell for the respondent.*

**DECISION OF THE BOARD;** May 17, 1983

1. This is an application for certification pursuant to the construction industry provisions of the *Labour Relations Act*.
2. This matter was set on for hearing to deal with the representations of the parties on the report of the Labour Relations Officer dated February 18, 1983.
3. The report of the Labour Relations Officer breaks down into two parts. The first part deals with three employees who can be termed "service employees", and thus, there arises a question about whether they fall within the bargaining unit of this application. The second group deals with three employees who have been challenged by the applicant as being managerial employees within the meaning of section 1(3)(b) of the *Labour Relations Act*.
4. We shall deal first with the three service employees and the question of whether or not they fall within the bargaining unit.
5. Notwithstanding the representations of the applicant concerning the credibility of the three witnesses who are service employees, the Board is of the view that the evidence in relation to these three employees is sufficient to decide their status.
6. The three employees in question deal essentially with the Hudac warranty for new homes. Thus, the prime reason for their job is to conduct a series of four inspections at periods of two weeks, three months, six months and 12 months of various purchasers of homes from the respondent employer. In the course of their duties in this regard they are required to deal with the purchasers of the homes in question. It is also part of their duties to effectuate any repairs that they can perform, but where they are unable to perform such repairs then call in "the appropriate trades" to perform the repairs. In this respect they perform work similar to the construction labourers employed by the respondent to deal with the cleaning up of the project at the end of the construction process.
7. The position taken by the respondent with regard to these employees is that they are construction labourers within the meaning of the *Labour Relations Act*. The position taken by the applicant is that they are not employees engaged in a construction

industry. Indeed, the position of the applicant is that they are employees engaged in the maintenance of a construction site. The applicant's position is that in an application under the construction industry provisions of the *Labour Relations Act*, the applicant ought not to be required to take industrial (non-construction) employees regardless of the extent of fragmentation in bargaining units caused by this separation of bargaining units. In this regard, the applicant relies on the oldest of the Board cases dealing with the definition of the construction industry, namely, *Tops Marina Motor Hotel* [1964] OLRB Rep. Jan. 583. That was an application by the carpenters union for certain employees of a company which was engaged in both the construction of a hotel and the on-going operation thereof. In the last paragraph of the decision the Board noted:

"However, the Board thinks it should be made clear that it is not the Board's intention to include in the present bargaining unit carpenters who may subsequently be employed by the partnership to do ordinary maintenance work once the motor hotel is in operation."

It is our view that the three employees are not construction labourers within the meaning of the Act, but are rather service employees and as such excluded from the bargaining unit.

8. Counsel for the respondent urged the Board to follow the decision of the Board in *PHI International Inc.*, [1980] OLRB Rep. Dec. 1789. That case involved two labourers who continued to clean up and do repairs after the purchasers had taken possession of certain condominium units. That case is clearly distinguishable from the present case in that those employees (who are similar to a number of the employees in the bargaining unit in this case) really did this work after the purchase simply as part of their normal job. In the present case, the three service employees form a distinct and separate operation and do not spend any of their time cleaning in the sense of the employees in the *PHI International Inc.* case and the other employees in the bargaining unit in the present case.

9. The remainder of the Labour Relations Officer's report deals with the three employees claimed to be managerial. Of these three employees, one Mr. Mitsu Yano, had previously been a superintendent for the respondent company, and the position taken by the respondent in this matter is that he had been demoted and was now a working foreman. On the basis of the evidence contained in the Labour Relations Officer's report we cannot accept this interpretation of the report. If Mr. Mitsu Yano was in fact demoted from superintendent, it is clear from the report of the Labour Relations Officer that his pay did not change and neither did his responsibilities change. He was in fact simply moved to a smaller job site. In our view, therefore, Mitsu Yano is excluded by virtue of section 1(3)(b) of the *Labour Relations Act*. With respect to the remaining two employees, Roy Boughner and Vince Valela, there is a substantial conflict in the report in terms of their actual duties, and in particular it appears that a number of the construction labourers who gave evidence were of the view that these two persons did not perform any work. However, we are prepared to accept the evidence of Roy Boughner and Vince Valela and the evidence of Mr. Alex Smith, and on that basis it is clear that these two persons occupy the position of working foreman. They are, therefore, including in the bargaining unit and not excluded by the operation of section 1(3)(b) of the *Labour Relations Act*.

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**2658-82-U The Ottawa Board of Education, Applicant, v. Ontario Secondary School Teachers Federation and others listed on Schedule "A", Respondents.**

**Strike - School Board refusing to negotiate continuing education programme with union - Concerted refusal by teachers to apply for teaching positions in programme - Concerted refusals to perform work outside *School Boards and Teachers Collective Negotiations Act* not "strike" - Teachers not obliged under employment relationship to staff programme - Not yet employees of Board with respect to programme - No strike under *Labour Relations Act***

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members W. F. Rutherford and I. M. Stamp.

**APPEARANCES:** *B. H. Stewart, Barry Brown, L. Tenare, R. Lintell and R. Gilbert for the applicant; Maurice A. Green, Bram Herlich, Morris Richardson, Marc Cazabon, Bert Callum and Donald Girourard for the respondents.*

**DECISION OF THE BOARD;** May 13, 1983

1. This is an application under section 67 of the *School Boards and Teachers Negotiations Act* for a declaration of an unlawful strike and, alternatively, under section 92 of the *Labour Relations Act* for a declaration of an unlawful strike. This application has been filed in response to the issuance of "pink letters" by the *Ontario Secondary School Teachers Federation* and by *L'Association Des Enseignants Franco - Ontariens*, advising their respective members, who teach in the regular day school programme of the applicant Board, not to apply for or accept employment with the applicant Board in respect of "night school credit courses for 1983-84 and summer school 1983."

2. Section 67 of the *School Boards and Teachers Collective Negotiations Act* reads as follows:

67. - (1) Where the Federation, an affiliate or a branch affiliate calls or authorizes a strike or teachers take part in a strike against a board that the board, a member association, the Council or any person normally resident within the jurisdiction of the board alleges is unlawful, the board, member association, Council or person may apply to the Ontario Labour Relations Board for a declaration that the strike is unlawful, and the Board may make the declaration.

(2) Where the Council, a member association or a board calls or authorizes a lock-out of members of a branch affiliate that the branch affiliate, an affiliate, the Federation or any person normally resident within the jurisdiction of the board alleges is unlawful, the branch affiliate, affiliate, Federation or person may apply to the Ontario Labour Relations Board for a declaration that the lock-out is unlawful, and the Board may make the declaration.

(3) Where the Ontario Labour Relations Board makes a declaration under subsection (1) or (2), the Board in its discretion may, in addition, direct what action, if any, a person, teacher, branch affiliate, affiliate, the Federation, a board, member association or the



Council and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or unlawful lock-out.

(4) The Ontario Labour Relations Board shall file in the office of the Registrar of the Supreme Court a copy of the direction made under subsection (3), exclusive of the reasons therefor, whereupon the direction shall be entered in the same way as a judgment or order of the court and is enforceable as such.

3. Section 92 of the *Labour Relations Act* reads as follows:

Where, on the complaint of a trade union, council of trade unions, employer or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or threatened to engage in an unlawful strike or that employees engaged in or threatened to engage in an unlawful strike, the Board may so dedclare and, in addition, in its discretion, it may direct what action if any a person, employee, employer employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

4. The parties agreed on statements of fact which were tendered along with the exhibits which are referred to in the statements. The statements of fact are reproduced below:

- (1) The Applicant Board of Education (herein called the "Applicant") is/was a party to a collective agreement with the Respondent Branch Affiliate, District 26 Ontario Secondary School Teachers Federation (herein called "District 26") and the Respondent Branch Affiliate, L'Association Des Ensignants Franco Ontariens Unite Ottawa Secondaire (herein called "Ottawa AEFO" and the Ottawa AEFO and District 26 are both referred to herein as the "Branch Affiliates").
- (2) The Respondents O.S.S.T.F. (hereinafter called "O.S.S.T.F.") and L'Association Des Ensignants Franco Ontariens (hereinafter called "A.E.F.O.") are "affiliates" as defined by the School Boards and Teachers Collective Negotiations Act (hereinafter called the "Negotiations Act"). The Respondents, District 26 and Ottawa A.E.F.O. are "Branch Affiliates" as defined by the Negotiations Act.
- (3) The parties agree that the Respondent Affiliates and Branch Affiliates are "Trade Unions" for the purposes of the Ontario Labour Relations Act, provided that the Ontario Labour Relations Board finds they have such status, and no issue is raised by the Applicant or the Respondents in these proceedings

on that issue. Exhibit 31 contains the Constitution, By-laws and other relevant material relating to the Respondent O.S.S.T.F. and the Respondent A.E.F.O.

- (4) Exhibit 28 contains the organizational By-laws and documentation of District 26 and Ottawa A.E.F.O.
- (5) The Branch Affiliates' attempts to have the terms and conditions of teachers employed in the Continuing Education Programme of the Applicant (more particularly, Summer School and Night School) covered by the terms of the Collective Agreement in existence between the Branch Affiliates and the Applicant are outlined in the proposals of the Branch Affiliate for inclusion in the 1980-82 Collective Agreement (Exhibit 3).
- (6) As a result of concluding the 1980-82 collective agreement, the parties established a joint O.S.S.T.F./Administration Review Committee on continuing education to study the Branch Affiliates' concerns relating to the employment relationship of such teachers and other concerns relating to the continuing education program. The terms of reference of such Committee are set out in the letter of the Director of the Applicant to the Presidents of the Branch Affiliates dated February 16, 1981 (exhibit 2).
- (7) The positions of the Branch Affiliates and the Applicant are set out respectively in Exhibits 4 and 5 being reports to the aforementioned Consultation Committee. The parties place exhibits 4 and 5 before the Board not to demonstrate the truth of their respective positions but to outline what in fact the positions of the Branch Affiliates and the Board were on the issues.
- (8) Such consultation procedures were unsuccessful in resolving the outstanding issues on continuing education. At the final meeting of the Consultation Committee in December of 1981, when it appeared that no agreement or resolution of the outstanding issues was possible the Respondent Robert Adair, a secondary teacher with the Applicant and a District 26 representative on the Consultation Committee as well as being the chief negotiator for the Branch Affiliates in the 1982-83 negotiations with the Applicant, stated to the representatives of the Applicant that, if the Applicant didn't change its position (on continuing education), the Branch Affiliates would request a "pink letter".
- (9) The Branch Affiliates attempted to have the proposals set out in exhibit 6, accepted by the Applicant in their negotiations for a 1982-83 collective agreement which negotiations commenced on or about February 1982. By December 15th, 1982 the negotiating parties of the Applicant and the Branch Affiliates had been

unsuccessful in agreeing to a collective agreement for the 1982-83 school year. The parties are in dispute as to the effect of the Inflation Restraint Act on the 1980-82 Collective Agreement which was to expire on August 31, 1982. The Respondent's position is set out in paragraph 2 of Schedule A to its reply and the Applicant's position is set out in paragraph 11 of Schedule B to its Application. The parties agree that the Board of Education is a "board" for the purposes of section 6(1)(c) of the Inflation Restraint Act.

- (10) The Applicant, while prepared to discuss the Branch Affiliate's concerns about continuing education, stated that the matter of terms and conditions of employment of persons employed in a Continuing Education program was not a proper matter for collective bargaining under the Negotiations Act.
- (11) The Respondents Hicks and Adair, properly described in exhibit 7, prepared and sent to the members of District 26 exhibit 7.
- (12) On April 22nd, 1982 at a negotiating meeting with the Applicant, the Respondent Adair on behalf of the Branch Affiliates stated/threatened that, if the Applicant continued to refuse to negotiate the issue of summer school and night school teaching, then District 26 and Ottawa A.E.F.O. would request and support the issuance of a pink letter applicable to the night school fall term of 1982 and that O.S.S.T.F. and A.E.F.O. members employed by the Applicant in the secondary schools would not apply for positions in continuing education and that such members who taught in continuing education could be disciplined. The Applicant's negotiator at the same meeting, upon being advised of the Branch Affiliates position, informed/threatened the Branch Affiliates and individuals present with criminal and civil proceedings and accused them of "conspiring to commit an illegal act punishable under the criminal code by a fine or jail". The expression "pink letter" was known to both parties to mean the issuance of written directions from the Affiliates in the form set out in exhibits 16 and 17.
- (13) Subsequently, on May 20th, 1982, after further discussion of the Summer School/Night School issue the respondent Adair informed the Applicant and the Respondent Donald Girouard, President Ottawa A.E.F.O., informed the Applicant that the Branch Affiliates supported the issuance of a pink letter by their respective affiliates, O.S.S.T.F. and A.E.F.O. The Respondent Girouard also stated that he, the Ottawa A.E.F.O. and the A.E.F.O. consulted with and supported the action of District 26 and O.S.S.T.F. and were so informing their members. The Applicant's representative advised that the Applicant's Board of Trustees would meet on the 27th May and consider the legal options available to the Applicant.



- (14) The Applicant's Superintendent of Personnel inquired as to the status of the request for a pink letter (exhibit 8) and was sent in reply exhibit 9 by the Respondent Hicks. On June 21st, 1982 the Applicant, through its chairperson, C. Jane Dobell sent to the Respondents Hicks and Girouard the letter listed as exhibit 10.
- (15) On June 23, 1982 the Respondent Hicks informed (exhibit 11) members of District 26 that it was obtaining advice from District 26's legal counsel and from the Provincial Bargaining Committee of the Respondent O.S.S.T.F. and that, while District 26 supported the issuance of a pink letter, this was a decision of the Respondent O.S.S.T.F. Subsequently, the Applicant learned that the issuance of the pink letter would not occur prior to the commencement of the fall 1982 Continuing Education Program (exhibits 12 & 13). In fact such Program was conducted in the fall of 1982 without disruption.
- (16) During discussion in the spring-summer of 1982 the Applicant was informed by officials of the Respondent Branch Affiliates that one of the major concerns of the Branch Affiliates was the number of students enrolled in the Day School Program of the Applicant who were enrolling in the evening courses of the Continuing Education Program of the Applicant. Accordingly, in order to satisfy this concern and thus ameliorate the differences between the Branch Affiliates and the Applicant concerning the staffing and remuneration of staff in the Continuing Education Program, the Applicant altered the eligibility rules as set out in exhibit 14 to increase the minimum number of adult learners, as defined in exhibit 14, required to be enrolled in an evening school programme before it could be provided and to instruct principals at the day school levels to provide greater access to various programmes in the day school before encouraging non-adult day school students to enroll in the evening Continuing Education Program of the Applicant. The Branch affiliates do not necessarily accept the long term efficacy of such policy.
- (17) On or about January 20th, 1983 Mike Weeks, the Principal of the Continuing Education program of the Applicant and a member of District 26, learned that the Branch Affiliates were going to "pink list" the Applicant in respect of its Continuing Education Program. As a result, on January 20th, 1983 Mike Weeks called the Respondent Bert Callum, the President of the Respondent District 26 and advised him of the rumour which he had heard. The Respondent Callum, confirmed the rumour and, as a result, attended at Mike Weeks' office at which time he showed Weeks the "pink letter" of the Respondent O.S.S.T.F. which is set out in exhibit 16, dated January 25, 1983. At that time the Respondent Callum advised that the pink letter would be effective starting May 1, 1983, that the Members of District

26 would be advised of this and that he had taken steps to clarify the ambiguity of the commencement date of the application of the pink letter as set out in exhibit 16.

- (18) The spring session of the Applicant's Night School Program was scheduled to commence on or about May 1, 1983 and the Applicant did not at January 20, 1983 have all staff committed to the program although the Administrators of the Night School had been appointed. The superintendent of the Continuing Education Program of the Applicant, Robert Gillett, was also in attendance at the meeting with the Respondent Callum and Mike Weeks on January 20th. Gillett asked whether the forthcoming pink letter was to apply to the administrators of the evening program to which the Respondent Callum replied that it did not. The officials of the Applicant, Weeks and Gillett, thereupon concluded that the pink letter would also not apply to the administrators of the summer school portion of the Continuing Education program of the Applicant. By this time the Respondents Ager, Moar and Harvie had confirmed their involvement in the Continuing Education Program of the Applicant for the summer of 1983. At such meeting the Respondent Callum informed the Applicant that District 26 would urge its members, Elementary Contract Teachers employed by the Applicant and elementary secondary contract teachers employed by the neighbouring Carleton Board of Education not to accept employment with the Applicant in its continuing education program including the May, 1983 Night School and the 1983 Summer School Program.
- (19) In 1982, the Applicant hired the Respondents Brian Moar, David Harvie and Barry Ager as Summer School principals for the Summer School Program held in 1982. Although the said offers of employment were stated to be for a two year period until August 1983, Michael Weeks, representative of the Applicant, advised the three Respondents that each side could review the question of being a principal for the 1983 Summer School Program. The respondent, Brian Moar, is not employed by the Applicant under contract, but is employed by the Carleton Board of Education and is a member of District 43, O.S.S.T.F.
- (20) In or about the late Fall of 1982, representatives of the Applicant contacted the Respondents Moar, Harvie and Ager and asked whether they wished to continue as summer school principals for the 1983 term. Each of the Respondents agreed to continue as principals for the 1983 term, prior to January 20th, 1983.
- (21) On or about January 25th 1983 the Respondent O.S.S.T.F. at the request of District 26 issued its "pink letter" in the form set out in exhibit 16 hereunder. The Provincial Executive referred to in

paragraph 3 of the pink letter are the Respondents Buchanan, Richardson, Dahl, Cottenden, Albert, Baumann, Buckthorpe and Hughes.

Exhibit #16

INFORMATION BULLETIN TO THE MEMBERS OF THE  
ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION

OTTAWA BOARD OF EDUCATION

Re: Night School Credit Courses 1983-84 and Summer School 1983

1. The members of O.S.S.T.F. in Ottawa, District 26, have been unsuccessful in negotiating with the Ottawa Board of Education a satisfactory settlement of the assignment to, and remuneration for, Night School Credit Courses for 1983-84 and Summer School, 1983.

2. Consequently, the Ontario Secondary School Teachers' Federation membership is advised that teaching positions with the Ottawa Board of Education relating to Night School Credit Courses for 1983-84 and Summer School, 1983, are unacceptable.

3. Any O.S.S.T.F. members who apply for or accept employment with the Ottawa Board of Education for the above positions after this date and until further notice shall not receive support from this Federation in matters relating to contractual and/or professional difficulties until such time as the Provincial Executive of O.S.S.T.F. declares that the member may once again receive support.

THE ONTARIO SECONDARY SCHOOL TEACHERS'  
FEDERATION

- (22) On or about January 27th, 1983 the Respondent A.E.F.O. at the request of Ottawa A.E.F.O issued its "pink letter" in the form set out in exhibit 17.

Exhibit #17

TO ALL A.E.F.O. MEMBERS

The members of the AEFO - Ottawa secondaire have not succeeded in reaching a satisfactory agreement with the Ottawa Board of Education concerning provisions relating to assignment and remuneration for teaching credit courses offered as part of the Continuing Education programme during 1983-1984 and the 1983 Summer School programme.



Teachers belonging to the AEFO must refrain from offering their services to the Ottawa Board of Education or accepting to teach night school or summer school courses until a satisfactory agreement has been reached.

Any AEFO member who applies for or accepts a teaching position in these courses will not receive support or assistance from the Association should he/she subsequently have contractual difficulties.

- (23) Following the meeting with the Respondent Callum, the Applicant during the week commencing January 31st, received confirmation from the Administrators of its May 1983 Evening School Programme and from the Directors (the Respondents Ager, Moar and Harvie) of its 1983 Summer School Program that they were prepared to carry on with their duties in respect of the Evening School Program and the Summer School Program.
- (24) On or about February 2nd 1983, the Respondent Callum on behalf of District 26 issued to members of District 26 the memorandum set out as exhibit 18.
- (25) On or about February 11th 1983, the Respondent Callum on behalf of District 26 issued to the members of District 26 the memorandum set out as exhibit 19.
- (26) Prior to February 18th 1983 but subsequent to the issuance of exhibits 16 and 17 the Respondent District 43 contacted officials of the Carleton Board of Education. The Respondent District 43 through its Chief Negotiator the Respondent Seabrook informed officials of the Carleton Board of Education that District 43 did not want to be forced to pink list the Carleton Board. The Respondent Seabrook informed officials of the Carleton Board of Education that District 43 was concerned that, if the Carleton Board permitted students of the Applicant to attend its Summer School Program that District 26 could request the Respondent O.S.S.T.F. to pink list the Carleton Board of Education. In order to avoid this occurring the Respondent Seabrook on behalf of the Respondent District 43, requested written assurances from the Carleton Board of Education which would permit her to assure District 26 and the O.S.S.T.F. that a pink listing of the Carleton Board of Education was not necessary. As a result, on or about February 18, 1983, the Carleton Board of Education caused exhibit 20 to be sent to District 43.
- (27) The Applicant and the Carleton Board of Education had co-operatively provided and jointly administered a joint Summer School Program for area students during the summers of 1981 and 1982 and had planned to continue their efforts in 1983. Such

joint planning involved the pooling of program offerings so that duplication would be avoided and at the same time geographic areas served by the two Boards of Education would be provided with as full a Summer School Program as was possible. The pooling of both the schools of the two Boards and their administrative and manpower resources permitted the two Boards to provide a greater program offering and avoid duplication of programs and other resources incidental to such programs. As a result of the withdrawal of the Carleton Board of Education from the joint Summer School Program offerings and the other restrictions set out in exhibit 20, the Applicant Board will not be able to provide the varied Summer School Programs which it would otherwise have been able to in co-operation with the Carleton Board without adding programmes and thus increasing the expenditure of public funds which would otherwise be avoided.

- (28) On February 17th, 1983 representatives of the Applicant met with representatives of District 26 (the Respondents Callum and Adair). The Respondents informed the Applicant at that meeting that the O.S.S.T.F. and the A.E.F.O. directed their respective memberships not to accept assignments in the spring 1983 terms (May-June 1983), the 1983 Summer School Program and the 1983-84 Night School Program. The Applicant reminded the Respondents that the Applicant considered such action unlawful and referred to exhibit 10.
- (29) Confusion existed among members of District 26 and District 43 who were administrators in the Night School Program and administrators in the Summer School Program (Ager, Moar and Harvie) as to whether the pink letter of District 26 and Ottawa A.E.F.O. applied to them. As a result, the Respondent Callum called a meeting of such administrators at his office on February 22nd, 1983 to which all of the evening school and summer school administrators were invited including the Respondents Ager, Harvie and Moar. Mike Weeks and Dennis Murphy, Vice Principal of the Applicant's Continuing Education Program and a member of District 26, were also permitted to attend the meeting held at District 26's office with the Respondents Callum and Adair.
- (30) The Respondent Callum on behalf of District 26 asked the members of District 26 who were administrators in the May-June Evening School Program of the Applicant to withdraw from their positions effective May 1st, 1983. The Respondent Callum on behalf of District 26 requested the Respondents Ager, Harvie and Moar to support the pink letter and withdraw from the 1983 Summer School positions. The Respondent Callum clarified that, although the pink letter (exhibit 16) did not clearly state that Evening and Summer School administrators were affected,

it was his instruction that they were. Further, the Respondent Callum, indicated that while the pink letter was not in place "officially" until July 1, 1983, he requested the Evening School administrators to withdraw from the May '83 Night School. In response to a question from the Evening School administrators the Respondent Callum replied that, if they continued in their positions in May and June 1983, nothing would happen, but if that continued in the September 1983 Continuing Education Program the sanctions would apply and the Affiliate and District 26 would be prepared to take action. The Evening School Administrators indicated that they would complete their assignments in May-June 1983.

- (31) The Respondent Callum indicated to the Respondents Ager, Moar and Harvie that the pink letter did apply officially to them as Summer School Directors and he wanted their support and withdrawal from the 1983 Summer School of the Applicant. The Respondents Ager, Moar and Harvie indicated that direction had been sought from the Respondent Morris Richardson, General Secretary of the O.S.S.T.F. and, when they had his response, they would advise the Respondent Callum and District 26.
- (32) Exhibit 24 contains the communications between the Applicant and the Respondent Ager and between the Respondents Ager and Richardson.
- (33) Exhibit 23 contains the written communications between the Applicant and the Respondent Harvie. The Respondent Harvie has been informed by the Respondent Richardson to the same effect as the Respondent Ager.
- (34) Exhibit 22 contains the written communications between the Applicant and the Respondent Moar and the Respondent Moar has also received advice from the Respondent Richardson similar to that received by the Respondent Ager.
- (35) Exhibit 25 contains the written communications between the Applicant and the Respondent Lamoureux. While the pink letter had been discussed between the Respondent Lamoureux and Dennis Murphy on behalf of the Applicant at the time of Lamoureux's initial interview on February 11th, 1983, the Respondent Lamoureux unconditionally confirmed his acceptance of the position in writing as set out in his letter of March 7th, 1983 to the Applicant contained in exhibit 25.
- (36) On or about February 25th the Respondent Callum on behalf of District 26 sent to members of District 26 exhibit 21.
- (37) There are approximately 1,150 O.S.S.T.F. members in District 26 and approximately 450 A.E.F.O. members employed by the



Applicant. In any one year, approximately 200-250 of such members may apply for and be accepted as employees to teach in a continuing education program. In most years, the Applicant will place advertisements in the schools and in the press, advertising for summer school positions. Applications are sent in by individual teachers and conditional acceptances are sent to the successful applicants in early April. The conditional acceptance is conditional upon there being sufficient enrollment for the summer school and during the last part of May and the month of June individual teachers are then advised that there is an unconditional acceptance of the application. In most years, the hiring of teachers for the fall term commencing in September of any year will begin in June with a similar procedure to summer school being followed and conditional offers of employment only being confirmed in mid-September after enrollment is known. By March 1983 it had become clear to all that exhibits 16 and 17 were not intended to apply to the May-June 1983 Night School but did apply to the 1983 Summer School and the 1983-84 Night School commencing September 1983.

- (38) The Applicant advertised teaching positions for the 1983 Summer School in substantially the same manner as it had done in the previous years. The deadline for all applications for teaching positions in the 1983 Summer School was February 18, 1983. In a normal year sufficient applications would have been received by such due date to select qualified teachers for the Summer School. For example, by the due date in February 1982, 165 applications had been received. By February 18, 1983, only 6 applications had been received.
- (39) The Respondents admit that the effect of the pink letters (exhibits 16 and 17) and other actions of the Respondents in support thereof have deterred O.S.S.T.F. and A.E.F.O. members from applying for employment with the Applicant for the 1983 Summer School Program and for the 1983 Night School Program. The Respondents also admit that the Applicant received in 1983 far fewer applications to teach in the said Continuing Education Program than it otherwise would have normally received. For example, in the 1982 Secondary Summer School of the Applicant, the Applicant employed 122 teachers: 66 of such teachers were members of District 26 and Ottawa A.E.F.O. regularly employed under Statutory Contract by the Applicant; 2 were Elementary Teachers of the Applicant regularly employed under Statutory Contract; 14 were Secondary teachers employed under Statutory Contract by the Carleton Board of Education and the remaining 40 were not regularly employed by the Ottawa or Carleton Board under the Statutory Contract. To date in 1983, only 10 members of District 26 and Ottawa A.E.F.O. and only 2 Carleton secondary teachers have

applied; the remaining applications are from outside the two systems.

- (40) Exhibit 27 contains applications for the 1983 Summer School of the Applicant from the Respondents William S. Smith, Geoffrey Burrows and Peter Bangs which applications are contingent on the removal of the O.S.S.T.F. pink letter.
- (41) Other teachers who are employed by the Applicant under Statutory Contract (in the form prescribed by Regulation as set out in Exhibit 26) in its regular Day School Program to teach in the Secondary Schools and who are members of the Affiliates A.E.F.O. and O.S.S.T.F. and the Branch Affiliates, District 26 and Ottawa A.E.F.O., would have applied for employment in the 1983 Summer School of the Applicant were it not for exhibits 16 and 17 and the other actions of the Respondents set out above. Counsel for the Applicant and the Respondents have agreed that it is not necessary, unless the Board so directs, to produce names of such Contract Teachers in order to render effective any order which the Ontario Labour Relations Board may seek to issue in this matter.
- (42) Applications for positions in the fall term of the Evening School portion of the Continuing Education Program are normally not solicited by the Applicant or received by the Applicant until June.
- (43) The Respondents have continued since the issuance of exhibits 16 and 17 to encourage support of and obedience to exhibits 16 and 17. Exhibit 30 dated March 31, 1983 was sent by the Respondent Callum to all members of District 26.
- (44) Listed in exhibit 26 are the Statutory Contracts of all the Respondents who are employed by the Applicant in its regular Day School Program.
- (45) Exhibit 1 contains explanatory material on the 1983 Summer School Program and a Report of the Applicant on the 1982 Summer School Program. Both counsel may orally supplement the explanatory material on the summer school.

### Argument

5. The applicant Board argues in the alternative in this matter. The Board argues firstly that the concerted refusal of the secondary school teachers in its employ to teach in its Continuing Education Program is a concerted activity designed to "interfere with the operation or functioning of a school program or school programs or of a school or schools", and is, therefore, a strike within the definition of that term in Section 1(l) of the *School Boards and Teachers Collective Negotiations Act*. The applicant argues that this

strike is unlawful because, contrary to the prohibition contained in section 63 of the *School Boards and Teachers Collective Negotiations Act* against strikes by teachers where a collective agreement is in operation, the teachers in this case have struck at a time when a collective agreement is in operation. The Board, citing the decision of this Board in *Broadway Manor Nursing Home and Fiddick's Nursing Home Limited*, [1983] OLRB Rep. Jan. 26, maintains that by virtue of the provisions of section 13 of *The Inflation Restraint Act*, the collective agreement between the parties to this matter, not just its terms and conditions, continues in full force and effect. The applicant argues further that the decision of this Board in *The Board of Education for the City of Windsor*, [1978] OLRB Rep. July 699, that the concerted refusal by secondary school teachers employed by the Windsor Board to apply to teach in that Board's Summer School program did not constitute a strike within the meaning of Section 1(l) of the *School Boards and Teachers Collective Negotiations Act*, can be distinguished. The applicant argues that in the *Board of Education for the City of Windsor* case *supra*, there was no collective agreement in operation, as there is in this case, and the elapsed agreement in that case had no reference to the teaching of summer school, as does the instant agreement. The applicant argues that Article 15 of the instant agreement, which is incorporated into the individual contracts of employment, anticipates that these teachers will teach in the Continuing Education Program. The Board argues that in these circumstances the concerted refusal to teach in the Continuing Education Program is a concerted refusal to accept a work assignment and, therefore, is no different than a concerted refusal to work overtime, even where overtime is voluntary under a collective agreement. The Board cites *Harding Carpets Limited*, 56 CLLC ¶18,030, *C & C Yachts Manufacturing Limited*, [1977] OLRB Rep. July 433, *B.C.L. Canada Inc.*, [1981] OLRB Rep. July 836, *Westeel Rosco Limited*, [1981] OLRB Rep. Dec. 1849, *MacMillan Bloedel (Alberni) Ltd., et al. v. International Woodworkers of America, Local 1085 et al.*, (1970) 13 D.L.R. (3d) 741, *Associated Clothing Manufacturers and Amalgamated Clothing Workers of America*, (1951) 2 L.A.C. 701 (Finkelman), *Printing Specialties and Paper Products Union*, 466, and *E.S. & A Robinson (Canada) Ltd.* (1970) 21 L.A.C. 354 (Brown), *United Steelworkers, Local 2950 and Greening Industries Ltd.*, (1971) 22 L.A.C. 105 (Weatherill) and *Atomic Energy of Canada Ltd. and Ottawa Atomic Workers Union, Local 1541 C.L.C.* (1978) 18 L.A.C. (2d) 302 (Weatherill) in support of the proposition that even though an employee may be entitled to take individual action the taking of that action in concert with other employees may constitute a strike and, therefore, depending on the time as of when the concerted action is undertaken, may be unlawful. In further support of this proposition the applicant referred us to *Halton Board of Education and OSSTF District*, (1978) 17 L.A.C. (2d) 279 (Swan), a case dealing with the concerted refusal of secondary school teachers also governed by the *School Boards and Teachers Collective Negotiations Act*, to apply for positions of responsibility within the schools of that Board. The applicant asks us to adopt the same interpretation of the definition of "strike" under section 1(l) of the *School Boards and Teachers Collective Negotiations Act* as was adopted in that case and to find, as did the arbitrator in that case, that the concerted action of teachers in refusing a work assignment constitutes a strike within the meaning of the definition. In summary, the applicant argues that although teachers are permitted to refuse to teach in the Continuing Education Program on an individual basis, the concerted refusal to teach in that program, at a time when a collective agreement is in operation which anticipates that the teachers covered by it will teach in that program, is an unlawful strike under the *School Boards and Teachers Collective Negotiations Act* and should be found to be so.



6. The applicant argues in the alternative that if the concerted refusal in this case is not found to be an unlawful strike within the meaning of the *School Boards and Teachers Collective Negotiations Act* then it is a strike under the *Labour Relations Act*. The applicant reminds us that this argument was not advanced in the *Board of Education for the City of Windsor* case, *supra* and has never before been considered by this Board. The Board argues that even if we follow the general approach taken in the *Board of Education for the City of Windsor, supra*, the teachers who are engaging in the concerted activity in this case are nevertheless employees of the Board and as such are governed by the *Labour Relations Act*. Because a person who teaches in the Continuing Education Program is not a teacher within the definition of “teacher” in section 1(m) of the *School Boards and Teachers Collective Negotiations Act* and, therefore, is not excluded from the operation of the *Labour Relations Act* by virtue of section 2(f) of that Act, the Board maintains that such a person is an employee under the *Labour Relations Act* in respect of the Continuing Education Program. Section 2(f) states that the *Labour Relations Act* does not apply to a teacher as defined in the *School Boards and Teachers Collective Negotiations Act*. *Board of Education for the Borough of Etobicoke*, [1977] OLRB Rep. July 415, *The Board of Education for the City of Toronto*, February 14, 1983, as yet unreported and *The Brant County Board of Education*, October 9, 1981, unreported, are cited in support of the position that teachers are considered to be employees within the meaning of the *Labour Relations Act* if not excluded from the operation of the Act under section 2(f). The applicant argues that although these teachers may not be teachers within the meaning of a “teacher” under the *School Boards and Teachers Collective Negotiations Act* they are nevertheless employees within the meaning of the *Labour Relations Act* and as such they are prohibited under the *Labour Relations Act* from refusing, in concert, to undertake a work assignment. The applicant argues that the teaching of Summer School in the Continuing Education Program is a work assignment, analogous to an overtime assignment in any other work setting. The Board relies on the fact that there are no bargaining rights outstanding in respect of teachers assigned to teach in the Continuing Education Program and argues therefore, that the preconditions to a legal strike or lockout under section 72 of the *Labour Relations Act* have not been satisfied. In these circumstances, the applicant asks us to find that the concerted refusal to teach in its Continuing Education Program is an unlawful strike under the *Labour Relations Act*.

7. The respondents ask us to adopt the approach followed in *Re Board of Education for the City of Windsor, supra*. The respondent asks us to find that the *School Boards and Teachers Collective Negotiations Act* regulates the relations between teachers and school boards in respect of the regular day courses taught during the regular school year and that accordingly, a concerted refusal to apply for employment as a summer school teacher is not a strike within the meaning of that statute. The respondents argue that this case cannot be distinguished from the *Board of Education for the City of Windsor, supra*. The respondents argue that article 15 of the instant collective agreement, unlike the language in the agreement considered in *Re International Longshoremen's Association Local 273 et al v. Maritime Employers' Association et al* (1979) 89 D.L.R. (3d) 289 (S.C.C.) does not create any obligation on the respondents to provide teachers for the Continuing Education Program or upon individual teachers to apply for positions in the Continuing Education Program. Although the respondents argue that section 13 of *Bill 179* does not extend the collective agreement, but only its terms and conditions, they ask the Board to avoid making a determination in this regard (because the issue is presently

before the Education Relations Commission) unless it is necessary to do so in order to decide this case. The respondents reject the analogy to a concerted refusal to work overtime, arguing that it is one thing to refuse in concert an assignment of work within the bargaining unit and quite another matter to refuse in concert an assignment that takes employees outside the bargaining unit and requires a change in employment status. It is the respondents' position that the Board cannot assign a secondary school teacher employed in its regular day school to teach in its Continuing Education Program. The respondents argue that the award of Professor Swan in *Halton Board of Education, supra*, does not assist the applicant because the concerted refusal in that case was in respect of a position within the ambit of the *School Boards and Teachers Collective Negotiations Act*. The respondents ask this Board to find that the concerted refusal of the secondary school teachers employed by the Ottawa Board of Education to apply to teach in the Board's Continuing Education Program is not a strike within the meaning of that statute.

8. The respondents also maintain that the concerted refusal to apply for positions in the Continuing Education Program is not a strike within the meaning of the *Labour Relations Act*. The respondents argue that a strike under the *Labour Relations Act* involves a concerted refusal by employees and, accordingly, where the persons who are refusing in concert have not entered into employment, the concerted activity cannot be a strike. The respondents argue that the persons taking concerted action are employees under the *School Boards and Teachers Collective Negotiations Act* and are, therefore, excluded from the *Labour Relations Act* until such time as they are hired outside of the *School Boards and Teachers Collective Negotiations Act*. The respondents reject the submission of the applicant that an employee, regardless of the nature of his employment, is necessarily an employee within the meaning of the definition of strike under the *Labour Relations Act*. The respondents maintain that where persons have not yet entered into an employment relationship in respect of the work in question, as the teachers in this case have not yet done in respect of the 1983 summer program, there is no prohibition in the *Labour Relations Act* against a concerted refusal to enter into the employment relationship. In this regard, counsel for the respondents reminds this Board that the "pink letters" caution teachers against applying for or accepting employment.

9. The respondents reject the submission of the applicant that section 70 of *School Boards and Teachers Collective Negotiations Act*, which allows teachers to withdraw voluntary services on an "individual basis", precludes a concerted refusal to apply for a different type of employment with the Board. The respondents argue that the voluntary services referred to in section 70 are services which are directly related to the operation of the regular day school, such as coaching and other extra curricular activities, and not teaching outside the ambit of the statute. However, the respondents argue that when section 18(1)(c) of Ontario Regulation 63/55 under the authority of the *Teaching Profession Act* is read in conjunction with section 51 of *School Boards and Teachers Collective Negotiations Act*, statutory support can be found for the concerted refusal which occurred in this case. Section 18(1)(c) of Ontario Regulation 63/55 under the authority of the *Teaching Profession Act* provides that "a member shall refuse to accept employment with a Board whose relations with the Federation are unsatisfactory." Section 51 of *School Boards and Teachers Collective Negotiations Act* provides that the provisions of any Act prevail over the collective agreement. Finally, the respondents argue that where the employer insists on dealing individually with applications for employment to the Continuing Education Program and refuses to acknowledge that the bargaining agent has any authority to negotiate the terms and conditions of employment

of those in the program, it would be inconsistent to find that it can deal collectively with teachers refusing in concert to apply to teach in the program.

10. The applicant makes a number of points in reply. The applicant argues that where the union has in the past tabled extensive demands in respect of the work in question, and where it is specifically dealt with under the collective agreement in the manner that it has been, the work must be characterized as a priority assignment and not as new employment. The complainant sees this as the essential distinction between this case and the *Windsor Board of Education* case, *supra* and argues that the *Halton Board of Education* award, *supra*, is of assistance to it because in that case, as with this, teachers refused in concert to accept a work assignment, which, as individuals, they were entitled to refuse. The applicant argues that just as the concerted refusal in the *Halton Board of Education* case, *supra*, was found to be a strike within the meaning of the *School Boards and Teachers Collective Negotiations Act* so also should the concerted refusal in this case be found to be a strike within the meaning of that statute. The applicant also relies on the *Halton Board of Education* award as authority for the proposition that section 18(1)(c) of Ontario Regulation 63/55 passed under the authority of the *Teaching Profession Act* does not permit the concerted action engaged in in this case. The applicant reads the *Halton* award as limiting the application of section 18(1)(c) of Ontario Regulation 63/55 passed under the authority of the *Teaching Profession Act* to situations where there are unsatisfactory relations between the Ontario Teachers' Federation (the parent body of the respondents) and a board. The applicant reiterates that what it is faced with in this matter is a concerted refusal by its employees to accept a work assignment, on instruction from their union, which, if done by any other union, or any other group of employees, would be illegal. The applicant maintains that the difficulty in this case is not deciding whether or not the persons who acted in concert are its employees, which clearly they are, but rather in deciding under which Act their concerted refusal constitutes a strike. The applicant asks us not to follow the course which the respondents suggest but to view the two statutes (the *School Boards and Teachers Collective Negotiations Act* and the *Labour Relations Act*) as an integrated whole so that secondary school teachers, as with all other employees, are prohibited from engaging in concerted activity prior to becoming certified or during the operation of a collective agreement.

### Decision

11. We will determine firstly if the concerted activity in this case constitutes an unlawful strike within the meaning of the *School Boards and Teachers Collective Negotiations Act*. In making this determination we focus on the definition of strike contained in section 1(1) of that Act. If the concerted activity in this case does not fall within that definition then, regardless of whether or not there is a collective agreement in operation, it cannot be an unlawful strike within the meaning of that Act. For the moment, therefore, we do not have to consider the meaning of section 13 of Bill 179 and whether or not its effect is to extend the collective agreement which governs the relations between the parties to this matter.

12. A "strike" is defined in section 1(1) of the *School Boards and Teachers Collective Negotiations Act* as:

"strike" includes any action or activity by teachers in combination or in concert or in accordance with a common understanding that is



designed to curtail, restrict, limit or interfere with the operation or functioning of a school program or school programs or of a school or schools including, without limiting the foregoing,

- (i) withdrawal of services,
- (ii) work to rule,
- (iii) the giving of notice to terminate contracts of employment.

13. This Board put its mind to the scope of the statutory definition of "strike" in the *School Boards and Teachers Collective Negotiations Act* in the *Board of Education for the City of Windsor* case, *supra*. In that case the Board was asked to decide an issue similar to that which is before the Board in this case; namely, whether the concerted refusal of secondary school teachers to teach in a summer school program constituted a strike within the meaning of the *School Boards and Teachers Collective Negotiations Act*. The Board observed in that case that (under what is now section 54 of the *School Boards and Teachers Collective Negotiations Act*) a collective agreement between a board and a branch affiliate is deemed to form a part of the statutorily imposed contract of employment between the Board and each teacher, that the contract does not envisage teaching duties other than during the regular year, that there is no reference anywhere in the Act to summer school programs and that "the whole scheme of the Act is designed to focus on relations between teachers and school boards during the course of the regular school year (as defined in the *Education Act*). The Board in finding that the concerted activity in the *Board of Education for the City of Windsor* case did not constitute a strike within the meaning of section 1(l) of the *School Boards and Teachers Collective Negotiations Act*, concluded that:

"... Where the Legislature throughout the statute has directed itself solely to collective bargaining facets concerned with teachers and boards integral to the regular school year it would, in our view, in the absence of explicit language, be wrong to consider that the Legislature in this one section of the Act (Section 1(l)) intended to refer to school programs or schools other than those to which the Act in general applies."

The ratio of the decision, therefore, is that programs which do not form part of the regular school year are not school programs or schools within the meaning of section 1(l) of the *School Boards and Teachers Collective Negotiations Act* and, therefore a concerted decision by teachers to interfere with the operation of these programs by refraining from offering their services in respect of these programs is not a strike within the meaning of that Act.

14. The applicant argues that we should distinguish this case from the *Board of Education for the City of Windsor* case, *supra*, because of the inclusion of Article 15 in the collective agreement between the parties. Where section 8 of the *School Boards and Teachers Collective Negotiations Act* stipulates that "Negotiations shall be carried out in respect of any term or condition of employment put forward by either party", where a collective agreement is defined in section 1(b) of the *School Boards and Teachers Collective Negotiations Act* as an agreement "... covering matters negotiable under this

Act” and, where section 54(1) of the *School Boards and Teachers Collective Negotiations Act* provides that “an agreement between a board and a branch affiliate shall be deemed to form part of the contract of employment between the board and each teacher who is a member of the branch affiliate”, it could be argued that provisions in a collective agreement pertaining to the staffing of a school program outside the range of school programs which make up the regular school year bring that program within the ambit of the *School Boards and Teachers Collective Negotiations Act*. Even if we were to conclude that the parties could extend the meaning of “school program” or “school” in section 1(l) of the *School Boards and Teachers Collective Negotiations Act* by executing a collective agreement which deals with subject matters that are otherwise beyond the meaning of those terms as used in that section, this result, insofar as it affects the meaning of these terms in section 1(l) of the *School Boards and Teachers Collective Negotiations Act*, would depend on the contractual language used. More specifically (and irrespective of the right of an individual teacher to refuse), the language would have to establish an obligation on the part of the teachers covered by it to staff the program in question. Without making a finding as to whether or not the parties can expand the meaning of the term “school program” or “school” in section 1(l) of the *School Boards and Teachers Collective Negotiations Act* beyond that found in *Re Board of Education for the City of Windsor, supra*, it is our view, for the reasons set out in paragraphs 21, 22 and 23 of this decision, that the language of article 15 of the instant collective agreement would not cause this result in any event. There is nothing before us, therefore, to cause us to broaden the meaning of the term “strike” in the *School Boards and Teachers Collective Negotiations Act*, as it applies to this matter, beyond that ascribed to it in the *Board of Education for the City of Windsor* case, *supra*.

15. Where the terms “school program” and “school” in the statutory definition of strike refer to school programs and schools carried on in connection with the regular school year, the analogy to a concerted refusal to work voluntary overtime does not hold up. In those cases where a concerted refusal to work voluntary overtime has been found to be a strike under the *Labour Relations Act* the concerted refusal has been in respect of work falling within the definition of strike contained in the *Labour Relations Act*. In this case the work in question is beyond the ambit of the statutory definition of strike upon which the applicant seeks to rely in making its first argument. Furthermore, where teachers refuse in concert to perform activities in respect of “school programs” or “schools” as these terms are used in the definition of “strike” in the *School Boards and Teachers Collective Negotiations Act*, as did the teachers who refused to apply for positions of responsibility in the *Halton Board of Education* case, *supra*, their refusal falls within the definition of strike in section 1(l) of the *School Boards and Teachers Collective Negotiations Act*. In our case, however, the concerted refusal was not in respect of a “school program” or “school” within the meaning of section 1(l) of the *School Boards and Teachers Collective Negotiations Act* and, therefore, the *Halton Board of Education* award, *supra* does not assist the applicant.

16. Before proceeding to the alternative position advanced by the applicant, we wish to deal with its submission that section 70 of the *School Boards and Teachers Collective Negotiations Act* should be read as prohibiting a concerted refusal to teach in its Continuing Education Program. The section reads:

Nothing in this Act precludes a teacher,

- (a) from terminating his employment with a board in good faith in accordance with the provisions of his contract of employment;
- (b) from withdrawing a voluntary service in good faith on an individual basis.

We have found that the reference to the school programs and schools in the definition of "strike" at section 1(l) of the *School Boards and Teachers Collective Negotiations Act* is restricted to school programs and schools operated during and in connection with the regular school year. It follows that the voluntary services referred to in section 70 of the *School Boards and Teachers Negotiations Act* are those which are offered during and in connection with the regular school year, such as coaching and other such voluntary undertakings. Section 70, therefore, does not assist the applicant in this matter.

17. The respondents argue that section 18(1)(c) of Ontario Regulation 63/55 passed under the authority of the *Teaching Profession Act* should be read as permitting the concerted activity which occurred in this case. The regulation reads:

18(1) A member shall

- (c) refuse to accept employment with a board of trustees whose relations with the Federation are unsatisfactory.

We need do no more in responding to the respondent's position in this regard than set out the response to that argument as found at page 285 of the *Halton Board of Education and Ontario Secondary School Teachers' Federation, District 9* arbitration award:

Finally, the branch affiliate advances an argument based on ss. 18(1)(c) and 18(2) of O. Reg. 63/55, passed under the authority of the *Teaching Profession Act*, R.S.O. 1970, c. 456. There are a number of technical difficulties as to the precise status of that Regulation, and as to its precise meaning in relation to the present case, but we do not need to canvass those here. Quite simply a Regulation, although passed under statutory authority, is not on the same footing with a statute, and no Regulation can confer on anyone a right to do something which is prohibited by another statute, or is (as is here the case) required by that statute to be proscribed by the terms of every collective agreement. A collective agreement cannot override a Regulation; but a statutory clause in a collective agreement must, if the purpose of the statute is not to be defeated. As a consequence, whatever O. Reg. 63/65 means, it cannot justify a breach of the clear provisions of the Act.

18. We now turn to the alternative position of the applicant; that is, if the concerted refusal in this case does not constitute a strike within the meaning of the *School Boards and Teachers Collective Negotiations Act* it must constitute a strike within the meaning of section 1(1)(o) of the *Labour Relations Act*. A strike is defined in section 1(1)(o) of the *Labour Relations Act* as follows:

"strike" includes a cessation of work, a refusal to work or to continue



to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output.

The threshold issue to be decided is whether the secondary school teachers who refused in concert to apply for positions in the applicant's Continuing Education Program are employees within the meaning of the statutory definition at the time of their concerted refusal. The applicant takes the position that these teachers are its employees for all purposes and, therefore, any concerted refusal in respect of any work assignment beyond the ambit of the *School Boards and Teachers Collective Negotiations Act* constitutes a strike within the meaning of that term under the *Labour Relations Act*.

19. We do not accept that every employee, regardless of the nature or location of his employment at any given time, is an employee within the meaning of the statutory definition of the term "strike" in the *Labour Relations Act* in respect of any and all work assignments which might be given to him by his employer. For example, a unit of production employees working at a plant in city "A" and covered by a collective agreement restricted in its geographic scope to city "A", with no reference to work assignments beyond city "A", can hardly be considered employees within the meaning of section 1(1)(o) of the *Labour Relations Act* in respect the work performed at another plant of the same employer located in city "B". There is a direct nexus between the term "work" and the term "employee" in the definition of "strike" under the *Labour Relations Act*. Employees within the meaning of the statutory definition of "strike" are those who are under an obligation, as a group, to perform the work in respect of which there is a concerted refusal. If a person has not yet become an employee at common law or, if an employee at common law but the work in question is beyond the scope of the employment relationship he is not an employee within the definition of "strike" in section 1(1)(o) of the *Labour Relations Act* for purposes of deciding if a concerted refusal to perform that work is a strike within the meaning of that Act. The term "strike" is defined under the *Labour Relations Act* to fit within a scheme which protects an employer from a concerted refusal to work (except at certain prescribed times) by those who are under an obligation to perform the work. The scheme was not designed to provide an employer with the means to compel persons who are refusing in concert to perform work which is beyond the scope of their employment relationship.

20. In this case we have come to the conclusion that the respondent teachers were not employees of the applicant in respect of its Continuing Education Program within the meaning of section 1(1)(o) of the *Labour Relations Act* at the time of their concerted refusal to apply for teaching positions in that program. The fact that they were required to, but had not yet, entered into new contractual relations with the applicant in respect of the Continuing Education Program suggests this to be the case. However, the requirement to enter into new contractual relations is not determinative. If there existed an obligation, either stated or implied, arising from the terms of their employment relationship that the work would be done by these employees then, regardless of whether or not they had the right to refuse as individuals, they might well be employees within the definition of "strike" in section 1(1)(o) of the *Labour Relations Act*, refusing in concert to do work within the meaning of that definition.

21. In order to determine if such an understanding exists we must look to article 15 of the collective agreement. Clearly, without article 15 the applicant would have no

grounds upon which to assert that there exists an obligation upon the respondents to staff the Continuing Education Program. Article 15 provides:

#### CONTINUING EDUCATION

15.01 The Parties agree that the rates for Continuing Education Teachers and administrators who are covered by the provisions of this Collective Agreement and who teach credit subjects at the secondary level will not be amended except by mutual agreement.

15.02 A list of proposed Continuing Education teaching positions will be made available to Teachers in the service of the Employer prior to outside advertisement. The Employer will give preference to existing staff who are qualified for the available Continuing Education positions and priority to redundant Teachers identified for lay-off under the provisions of Article 18.

In our view, this language, while it creates a benefit for the teachers covered by the collective agreement, does not create an obligation upon these teachers to staff the Continuing Education Program such that a refusal in concert to enter into new contractual relations in respect of these positions would constitute a strike within the meaning of the *Labour Relations Act*. There is no express obligation here, as there was in *Re International Longshoremen's Association, Local 273 et al v. Maritime Employers' Association et al, supra*, nor is there an implied obligation as exists in respect of overtime work within the bargaining unit.

22. The *International Longshoremen's Association, Local 273 et al. v. Maritime Employers' Association et al, supra*, while not on all fours with this case, where the persons refusing are already employees of the employer at common law, is instructive because it deals with contract language which creates an express obligation to perform certain work and the interrelationship between that obligation and a statutory definition of "strike" which is identical in all material respects to that contained in the *Labour Relations Act*. In that case the Supreme Court entertained an appeal from an injunction issued against three trade unions who had refused to supply labour although party to a collective agreement which contained a hiring hall arrangement under which the unions undertook to supply labour and the employers undertook to employ those referred under the agreement under terms and conditions of employment specified in the agreement. The injunction was challenged on the principal ground that there were no employees of the respondents at the time of the application for injunction who refused work within the meaning of the definition of strike; i.e., those who were refusing to work were not yet employees. The Supreme Court capsulized the import of the relevant contractual provisions as follows at page 292:

"In each agreement the locals undertake and agree to supply the labour required by the members of the association and the association in turn agrees to assign the work as described in the collective agreement to members of the locals so long as they are recognized by certification."

In dismissing the contention of the trade union that at the critical times there were no

employees of the Association who could have engaged in a strike, the Court commented at page 293:

“The pattern established by the agreements is simple. When a participating employer of stevedores requires labour for the unloading of vessels, the employer notifies the local in the manner prescribed by the agreement and the local assigns to that employer the work forces required. The agreements by detailed provisions, establish the method of computing the pay and the procedure for regulating the hours worked by each member of the local for the employer company. Thus in a technical sense, the relationship of employee-employer as it is recognized in the common law, may not arise until the member of the local has reported to the requisitioning member of the Association for work in the Port of Saint John. Beyond that technical basis, the argument has no merit. When these collective agreements were signed by the officers of the Association and the officers of the Locals, all the parties to the agreements recognized the peculiar or particular characteristics of the stevedoring business in the Port of Saint John; the local for its part undertook to supply the required labour, and the Association, on behalf of its member employers, undertook to assign stevedoring work only to members of the Locals. The agreements in their entirety are predicated upon this relationship and on the fact that labour would be required only when work was available to be performed and that hence the remuneration would be paid to members of the Locals only when services are requisitioned by the Association members pursuant to the terms of the collective agreements. For the purposes of collective bargaining and labour relationships under the resulting collective agreements, members of the Association and members of the Locals were respectively employers and employees from the onset of the agreements, whatever their rights and obligations may or may not include under the common law of master and servant.”

23. The judgment provides us with a very useful backdrop against which to assess the obligation, if any, upon the teachers covered by Article 15 of the instant collective agreement to staff the Continuing Education Program, such that a concerted refusal on their part to do so would constitute a “strike” within the meaning of the *Labour Relations Act*. No such obligation can be read into article 15 of the instant collective agreement. An agreement that rates which have been unilaterally established by the applicant will not be amended except by mutual agreement and a further agreement that the teachers covered by the collective agreement will be given preference in the filling of positions in the Continuing Education Program, or priority if on layoff, cannot be read as creating an obligation upon the respondents or their members to staff the applicant’s Continuing Education Program. We are satisfied, therefore, that the teachers who are refusing in concert to apply for positions in the applicant’s Continuing Education Program are not employees in respect of the Continuing Education Program nor do they have an express or implied obligation to perform the work, and, therefore, their concerted refusal to apply to teach in the Continuing Education Program is not a “strike” within the meaning of section 1(1)(o) of the *Labour Relations Act*. In this regard the teachers in this case are no different than any other persons who refuse in concert to either accept employment or



accept a work assignment that is clearly beyond the bounds of their employment relationship.

24. In summary, we have found that the applicant's Continuing Education Program cannot in this case be found to be a program or a school within the meaning of the term "school program ... or school" in the definition of "strike" in the *School Boards and Teachers Collective Negotiations Act* and, therefore, the concerted refusal of the teachers under contract to teach in its regular day school program to apply to teach in its Continuing Education Program, is not a strike within the meaning of that Act. We have also found that these teachers are not yet employees of the applicant in respect of its Continuing Education Program and, are under no obligation to staff the applicant's Continuing Education Program, so that, their concerted refusal to apply to teach in the Continuing Education Program does not constitute a strike within the meaning of the *Labour Relations Act*.

25. Having regard to all of the foregoing this application is hereby dismissed.

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**0259-82-R** Gaetan Perreault, Applicant, v. United Brotherhood of Carpenters and Joiners of America, Local 2486, Respondent, v. **Roy Construction and Supply Company Limited**, Intervener.

Construction Industry - Reconsideration - Termination - Board's prior decision holding attempt to amend unit in provincial agreement contrary to s.146(2) - Board decision not dealing with right of unions to settle grievances - Petition circulated and application for termination filed by working foreman - Employee perception of working foreman as employer representative causing Board to dismiss application

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members  
W. H. Wightman and S. Cooke.

**APPEARANCES:** G. J. Sullivan and Gaetan Perreault for the applicant; H. F. Caley, B. W. Adams, R. Charette and A. Cooper for the respondent; K. R. Valin and Gerry Boileau for the intervener.

**DECISION OF VICE-CHAIRMAN, D. E. FRANKS AND BOARD MEMBER S. COOKE;** May 19, 1983

1. By a decision dated December 21, 1982 (now reported at [1982] OLRB Rep. Dec. 1904) the Board directed this matter to be listed for continuation of hearing. Subsequently, counsel for the respondent trade union requested the Board to reconsider its decision of December 21, 1982, and in particular that part of the decision that related to the Board's interpretation of section 146(2) of the Act. The request for reconsideration was based largely on the matter that the Board had not heard the representations of the parties on section 146(2). At the hearing in this matter, the Board therefore allowed the respondent to make its representations with respect to section 146(2) as dealt with by the Board in paragraph 12 of its decision of December 21, 1982 in this matter.

2. The concern of the respondent was with paragraph 12 of the Board's decision. That paragraph reads as follows:

"The problem with the argument raised by the respondent in this matter is the proposition that the agreement referred to in paragraph 9 above (setting out the relationship between the employer and the respondent trade union) delineates a bargaining unit in the collective agreement between the intervener and the respondent. The collective agreement referred to in paragraph 1 of the agreement referred in paragraph 9 refers to the provincial collective agreement between the Carpenters' Employer Bargaining Agency and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America. The effect to be given paragraph 2 which exempts certain jobs has to be read subject to section 146(2) of the Act:

'On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee trade union, council of trades unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.'

It would appear, therefore, that section 2 of the agreement dated December 21, 1981, insofar as it attempts to vary the bargaining unit in the provincial collective agreement would be null and void. Now the effective paragraph 2 in the agreement of December 21, 1981 may very well be that neither the intervener nor the respondent can bring proceedings before this Board or any other tribunal, but for the present case, it is sufficient for us to note that vis-a-vis the employees who are not party to that agreement, that attempted amendment of the bargaining unit in the provincial agreement is null and void by virtue of section 146(2) of the Act. It would, thus, appear that notwithstanding the attempt by the respondent and the intervener to amend the bargaining unit in the provincial agreement, the applicant and the employees on the list of employees are employees in the bargaining unit of the provincial agreement in effect between the respondent and the intervener company."

The respondent's position was that such an interpretation of section 146(2) prevented the effective settlement of many types of grievances in the construction industry where the union might in effect be varying the terms and conditions of the provincial agreement. It is our view that the interpretation given to section 146(2) in the above paragraph does not at all affect the settlement of grievances in the construction industry. The interpretation of section 146(2) in that paragraph simply refers to an attempt to amend the bargaining

unit in the provincial agreement, and that insofar as it relates to the employees in the application, it is ineffective. Clearly, such a finding says nothing about the settlement of the grievance in the section 124 case, and indeed, it was not our intent to deal with that issue. Clearly, there may very well be settlements of grievances which would violate the spirit and intent of section 146(2) of the Act, while there might very well be other settlements which do not affect section 146(2). Those matters will undoubtedly have to be dealt with in cases where such an issue is raised. Clearly, paragraph 12 of our decision of December 21, 1982 did not deal with the issue of the validity of the settlement of the grievance, but merely with a very specific portion of this settlement and its effect on parties not involved in the settlement.

3. In this application for termination by Gaetan Perreault there was filed with the Board a petition containing the names of ten employees circulated by Mr. Perreault. Mr. Perreault consulted his lawyer who in turn typed up the heading at the top of the petition and instructed Mr. Perreault concerning its circulation. The evidence was clear that all of the signatures were obtained at the employees homes or away from the work site. The question which we are required to deal with is whether the petition itself represents the voluntary wishes of the employees.

4. Mr. Perreault is the working foreman for the carpenters employed by the intervener, Roy Construction and Supply Company Limited (hereinafter referred to as "Roy Construction"). At the time in question there was only one job being performed by the employees of Roy Construction. By Mr. Perreault's own evidence he was the senior employee on that job site. His evidence is that he makes no management decisions, such as for instance, hiring or firing an employee, or deciding whether to work overtime or not. His evidence is clear that in such circumstances he always checked with the office. It is also clear that the person in the office who Mr. Perreault reported to, Mr. Boileau, was only at the job site for limited amounts of time on any given workday. As a working foreman then, Mr. Perreault would not be excluded by virtue of section 1(3)(b) of the *Labour Relations Act* on the basis of his duties and responsibilities and, indeed, this is in conformity with the general practice in the construction industry, which is that working foremen are employees in the bargaining unit and the management line is drawn at non-working foremen.

5. Since Mr. Perreault is an employee in the bargaining unit, does it therefore follow that the petition circulated by him represents the voluntary wishes of the employees? That is, is it free of any employer influence such as would cause the Board to reject the petition? On the evidence, it is clear that there was no one at the construction site above Mr. Perreault to whom he reported. Indeed, not only was he the senior man on site as working foreman, his evidence is that one of the other petitioners who was also a working foreman *reported* to him. It is also clear from Mr. Perreault's evidence that, for instance, in obtaining one of the names on the petition he left the work site without seeking any permission, since this was something well within his power to do. It is clear then that Mr. Perreault's position vis-a-vis the other employees on the job site was that he was the representative of the employer on that job site, and indeed, the *only* representative of the employer on the job site for most of the time.

6. In such circumstances, we are of the view that the perception of the employees to Mr. Perreault circulating the petition is that they were approached by the representative of the employer to sign the petition, and thus, we cannot accept the



petition as being representing the voluntary wishes of the employees in these circumstances. See, for instance, *Quality Circuits Manufacturing Limited* [1979] OLRB Rep. Aug. 794.

7. For the foregoing reasons the application is therefore dismissed.

#### **DECISION OF BOARD MEMBER, W. H. WIGHTMAN;**

1. I associate myself with my colleagues in their disposition of this matter except with regard to the finding that the petition should fail on the grounds that employees would have perceived the applicant, Mr. Perreault, as a “representative of the employer” notwithstanding the fact that he was at some pains to distance himself from the employer as indicated particularly at paragraph 3 of the majority decision.

2. The nature of the construction industry is such that the terminology “working foreman” is appropriate and descriptive of a job function through which work can be assigned and sequenced without requiring that the incumbent bear or exercise managerial or supervisory responsibilities. In some settings the term “pusher” has been used to describe individuals whose responsibilities were rightly comparable to that of “working foreman”. Whatever the terminology used, the Ontario Labour Relations Board has concluded that individuals working in such a capacity have a community of interest with the other non-supervisory employees and should properly be included in units the Board determines as being appropriate for collective bargaining.

3. I believe the Board, in concluding that working foreman should be included in bargaining units, is attempting to be consistent with the scheme of collective bargaining which the legislation envisages and for which it provides the ground rules.

4. However, I do not believe it is either fair to the individuals concerned or consistent with good labour/management relations that they should be simultaneously regarded as both fish and fowl. As a member of a bargaining unit, and the union representing those employees, there is presumably no bar to a working foreman being elected an officer of the local union. One would presume that election to an officer status within the union could be taken as an indication of how that individual is “perceived” by fellow workers, and indeed, it might be argued that would be stronger evidence of worker perceptions than the inferences the Board chooses to draw from the working relationships described to it in the course of a hearing.

5. I will not speculate as to how the Board might have viewed this petition had the applicant been an officer of the union. Rather, I would argue that a member of the bargaining unit is a member of the bargaining unit and should be permitted to engage in activities he or she considers to be in the interests of bargaining unit members and in self-interest.

6. Presumably Mr. Perreault was engaged in an activity which is protected under the Act such that were he to have been found out and discharged by the employer on the grounds that the company did not want to leave itself open to having to deal with some other union, the employer could have been found guilty of an unfair labour practice to wit: unjust and arbitrary dismissal.

7. By denying the petitions of bargaining unit employees because of the notional grounds of perceptions as between members of the same bargaining unit, it strikes me that the Board is also acting in an arbitrary and unjust manner.

8. I find support for my position in the *A. N. Shaw & Sons (Eastern) Ltd.* case [1980] OLRB Rep. Oct. 1347 wherein the Board found that the applicant and originator of the petition exercised supervisory functions and, moreover, that "Employees would have been well aware of (his) supervisory role, particularly assigning work" (paragraph 11). Notwithstanding these findings, which are supported by evidence recounted in a dissenting opinion by Board Member C. A. Ballentine, the Board in that case concluded that this member of supervision would have been perceived by other employees as "acting in his own interests rather than acting on behalf of management".

9. Perhaps a solution to the avoidance of these problems would be for the Board not to include working foremen in bargaining units. In any event, I do not feel the Act should be interpreted in such a way as to preclude an individual from acting in what he perceives to be his own interests or of inadvertently prejudicing the interests or wishes of other employees.

10. I would have accepted the petition and directed a vote as requested by the applicant.

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**2010-81-R; 2011-81-U United Steelworkers of America, Applicant, v. Securicor Investigation and Security Ltd., Respondent; United Steelworkers of America and United Steelworkers of America Local 7105, Complainants, v. Securicor Investigation and Security Ltd., Respondent.**

**Interference in Trade Unions - Remedies - Unfair Labour Practice - Employee of security agency posing as striking employee - Making regular reports on union activity - Inciting violence and unlawful conduct - Presumption of motive to interfere with union where infiltration during or prior to strike - Proof of actual interference not required - Board finding conduct of spy prolonging strike - Security agency directed to reimburse wages and strike pay for period prolonged - Quantum halved in view of settlement with joint - tortfeasor - Agency required to report involvement in strikes or lockouts in province for period of two years.**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members F. W. Murray and W. F. Rutherford.

**APPEARANCES:** *Brian Shell, J. de Klerk and John Fitzpatrick for the applicant and complainants; R. B. Cumine, Q.C. and Dean Peroff for the respondent.*

**DECISION OF KEVIN M. BURKETT, ALTERNATE CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; May 12, 1983**

1. The Board has before it a complaint against Securicor Investigation and Security Ltd. (hereinafter referred to as Securicor) alleging that Securicor, by its actions in connection with a lengthy strike by the employees of Automotive Hardware, Federal

Bolt and Nut Corporation and Automotive Screw Machine Products Limited, (all companies under common control and direction and located at the same street address and hereinafter referred to as Automotive), violated sections 64, 66(c) and 70 of the *Labour Relations Act*. Specifically, it is alleged that the Automotive companies entered into an agreement with Securicor whereby David Ivers, a private investigator employed by Securicor, would be hired as an employee of Federal Bolt and Nut for the purpose of infiltrating the trade union and reporting back to the company on its activities and acting as an “agent provocateur” during the course of a lawful strike.

2. The hearings in this matter extended over 18 days during which the Board heard the testimony of 12 witnesses and during which hundreds of pages of documentary evidence was tendered. This is the first time that the Board has been called upon to inquire into the activities of a security company acting on behalf of an employer engaged in a labour dispute; an issue which has been the subject of much recent public debate. Accordingly, the Board has gone to great length to provide a detailed summary of the evidence and to set out the underlying labour relations principles which apply in a case such as this.

3. The provisions of the Act which it is alleged have been violated are set out below:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

4. Automotive was the sole respondent in the matter until Securicor was added as a respondent on or about February 24, 1982. However, in April 1982, the complainant union, as part of the settlement to its labour dispute with Automotive, agreed to seek



leave of the Board to withdraw the complaint against the Automotive companies thereby leaving Securicor as the sole respondent. In response to the complainant's request to withdraw against the Automotive companies, Securicor took the position that the Board should deny the request. Alternatively, Securicor took the position that if the Board allowed the request to withdraw against Automotive the complaint against Securicor should be dismissed. Finally, Securicor took the position that if the Board allowed the withdrawal against Automotive and refused to dismiss the complaint against Securicor, it must allow Securicor to add Automotive as a respondent. The arguments advanced by Securicor in support of its position are set out fully in the interim decision of the Board in this matter dated May 18, 1982, reported at [1982] OLRB Rep. May 759.

5. In its decision of May 18, 1982 the Board allowed the complainant to withdraw against Automotive and to proceed against Securicor. The Board summarized its ruling at paragraph 20 of its May 18, 1982 decision as follows:

20. In summary, the Board has before it a complaint against Securicor; a private company in contractual relations with the employer, Automotive, ostensibly to provide security services for a fee in connection with a labour dispute. The complainant union as part of a settlement to the labour dispute, a long and bitter strike, has agreed to withdraw the complaint against the employer. Securicor argues that the effect of this withdrawal is to create a withdrawal against itself or, alternatively, if the matter is to go on, the agreement between the parties to the labour dispute must be ignored and the request to withdraw against Automotive rejected. We have determined that Securicor is regulated by the prohibitions contained in sections 64 and 66 of the statute in all of its activities in connection with the labour dispute. Furthermore, we have satisfied ourselves that if we allow the complainant to proceed against Securicor alone, the requirements of natural justice can be met. In any event, a breach of section 70 is alleged against Securicor and clearly, as a "person" within the meaning of that section, Securicor must defend that aspect of the complaint. The allegations against Securicor give rise to an issue which the Board, with its specialized knowledge, should inquire into. Having regard to all of the foregoing, we hereby consent to the withdrawal of this complaint against Automotive and allow the complaint to proceed against Securicor. Having withdrawn against the employer Automotive, the complainant loses the advantage of the reverse onus and may have prejudiced itself with respect to the extent of the remedial relief granted if the allegations are proven.

#### Evidence

6. The employees of the Automotive companies working at the Brown's Line location fall within four bargaining units; three production units, one for each of the three Automotive companies, and an office and clerical unit. There are some 380 employees of the company within these bargaining units. The production units are represented by Local 7105 of the United Steelworkers of America while the office and clerical unit is represented by Local 9056 of the United Steelworkers of America. Separate collective agreements cover each of the four bargaining units although the

bargaining for these agreements is done concurrently. The Automotive companies and the United Steelworkers have had a 16-year collective bargaining relationship. The union served the company with notice of its intention to bargain renewal agreements on June 23, 1981 and the first meeting between the parties was held on July 14, 1981 with subsequent meetings on August 19 and 20, 1981.

7. The evidence is that the union, under the direction of Mr. John Fitzpatrick, the Toronto area regional supervisor, decided to push for a number of fundamental changes, most notably, common seniority between the production units and an extended geographic recognition. Mr. Fitzpatrick explained that Automotive had announced its intention to phase out its Automotive Screw Machine operation in January, 1980 and was down to 28 long-service employees at the time the parties commenced bargaining for renewal agreements. He explained further that under the existing contractual arrangements, the company could hire off the street to staff one of its operations while employees from another one of its operations were on layoff. Finally, he explained that because the company's operations were located only five blocks from the Metropolitan Toronto boundary, the union was determined to extend the geographic scope of its recognition beyond the standard Metropolitan Toronto boundary so that its bargaining rights would not be lost if the company moved its operation outside Metropolitan Toronto. Mr. Fitzpatrick testified that the strategy he adopted was to deal with these and other language items before allowing the focus of the negotiations to shift to the monetary items. The company, for its part, was determined to maintain the long-standing status quo and therefore, was not prepared to give in on these items, although recognizing that the Stelco monetary pattern had application. The negotiations became deadlocked almost from the outset. It was obvious to those involved, following the first few meetings in August, that the renegotiation of the collective agreement was going to be a most difficult undertaking.

8. Mr. Kenneth Ranny, the Vice-President of Operations of the Automotive companies, was called as a witness by the complainant trade union. He acknowledged freely that the company retained the services of Securicor in late August, 1981 and that an arrangement was made whereby a private investigator employed by Securicor would be hired as a bargaining unit employee of Federal Nut and Bolt. Mr. Ranny explained that the company had been subjected to a long and bitter strike at its Toronto-based Arrowhead operations in 1980 as a result of which the company had suffered extensive property damage. The bargaining agent at that location is not the United Steelworkers of America, as at the Browns Line site, but the United Automobile Workers (U.A.W.). It is Mr. Ranny's evidence that, in order to avoid a repetition, the company decided to retain Securicor and to allow one of its investigators to be hired as a bargaining unit employee for the purpose of forewarning the company of any planned sabotage, property damage or violence.

9. David Ivers, a 42 year old private investigator with Securicor, was hired into the Federal Nut and Bolt bargaining unit as a cleaner on September 3, 1981; some 25 days before the commencement of what proved to be a 6 1/2 month strike. He commenced to write daily written reports on September 3, 1981 and continued to prepare and file these reports until he was removed from the picket line on February 17, 1982. These reports were submitted twice per week to Mr. Frank McGladdery, the Director of Intelligence at Securicor. Mr. McGladdery in turn had these reports delivered to the home of Mr. Ranny. On a number of occasions Mr. McGladdery contacted Mr. Ranny by telephone

for the purpose of bringing him up-to-date prior to the sending of the written reports. Mr. Ranny met face to face with Mr. Ivers on three occasions. We will deal with each of these meetings as we review the activities of Mr. Ivers during the period he acted as undercover investigator for Automotive posing as a bargaining unit employee. Both the Ontario Provincial Police and the Metropolitan Toronto Police were aware that Mr. Ivers was operating as the undercover agent from the outset. Indeed, prior to confirming this fact to the union in February, the Ontario Provincial Police notified Securicor and recommended that Mr. Ivers be removed from the line.

10. The reports filed by Mr. Ivers provide a detailed and, in our view, accurate account of his activities as an undercover investigator hired into the Automotive bargaining unit. These reports demonstrate an acute interest by Mr. Ivers in a range of union related matters totally unrelated to the protection of the company's physical property and non-bargaining unit employees. Indeed, in his very first report, on September 3, 1982, Mr. Ivers explains that, with the exception of his lunch break:

there is not much time to spend with any one employee to discuss the union.

11. The reports which were filed prior to the strike reveal that Mr Ivers made a concerted effort to involve himself with and gain the confidence of Mr. John Kelly, the president of the production local. The reports in the period September 3rd to September 28th are replete with references to Mr. Kelly and to conversations between Mr. Ivers and Mr. Kelly. Mr. Ivers reports on September 11th that:

while I was talking with John Kelly this afternoon I offered my assistance in any way he felt I may be able to help with the upcoming strike.

In his September 17, 1981 report Mr. Ivers asks Automotive

If there is any specific information the company requires or any misinformation they would like delivered or any suggestions I could make to the union on behalf of the company that could help them, please forward such to me, through Securicor Investigations.

This question, as with his involvement with Mr. Kelly, suggests that Mr. Ivers did not consider himself restricted to relaying information related to the protection of company property and personnel. Indeed, on September 20th Mr. Ivers reported on a union meeting as follows:

The greater part of the remainder of the meeting was spent listening to John Fitzpatrick explain to the men how the union is proceeding for the men in the order of: 1) seniority within the plant 2) money 3) working environment.

John explained to the men that at this time no one has seniority security and that a man with twenty-five (25) years of service could be let go at any time and a new, younger man brought in at a lesser pay. He further explained that the union would be going after not only a



fair increase in pay for the men but if they stuck together, he would get them even more along with a better working environment.

John Fitzpatrick explained to the men that there are a number of items within the union proposal that are not necessarily needed by the men or really expected to be received by the union. These items were entered only to be used as give and take items in negotiations with the company.

As early as September 22nd Mr. Ivers is reporting on his assessment of the mood of the employees and suggests to the company,

Even if the company were to offer the men a continuance of their last contract, I know that the union would not accept it but I feel that the men would gladly have this instead of going out on strike.

12. Mr. Kelly testified that in his mind Mr. Ivers attempted to "set him up" on two occasions prior to the strike. Mr. Kelly testified that in early September Mr. Ivers offered to buy his protective ear muffs from him for \$12:00 and suggested he pick up another pair in the plant. Mr. Kelly testified that on another occasion Mr. Ivers told him that he had two cases of coffee cups which the company did not know had been ordered and suggested that he put them in his car over the lunch break for use during the strike. Mr. Kelly testified that the company has a policy of automatic termination for theft and, therefore, he refused both overtures. Mr. Ivers recalled both incidents but denied that he had attempted to "set-up" Mr. Kelly. He testified he understood that Mr. Kelly was expecting a replacement pair of ear muffs so that he asked him for his old ones. Mr. Ivers testified that he mentioned the existence of the extra two cases of coffee cups to Mr. Kelly but did not suggest he steal them. He testified that he told his foreman about them right after his conversation with Mr. Kelly. There is no reference to either of these incidents in Mr. Ivers' reports. However, in his December 23, 1981 report Mr. Ivers suggests a way of "nailing" Mr. Kelly. He stated:

It has been pointed out to me that each of the bolt-makers has been given a test and his grade and salary is based upon the results of that test. A number of people have stated that the only exception to this rule has been John Kelly. Because of his position or for other reasons Kelly has been given a grade twelve (12) pay rating with no actual testing. If this is true, one way of nailing Kelly would be to test him. Most of the men to whom I have talked feel there is no way Kelly has the knowledge or ability as a bolt-maker to pass the test which would allow him a grade twelve (12) status. If he could not pass the test, it would be a good way to drop him a grade or two (2) and is fully within your rights.

13. The reports filed by Mr. Ivers during the first ten days of the strike focus on the administration of the strike and on the activities of strikers which might pose a threat to the protection of company property. There are a number of references to the spreading of nails in the driveways to puncture tires and to the breaking of windows. Mr. Ivers was secretly taking pictures during the period and reported on September 30th that he left the line at about 10:30 a.m. to meet with Mr. McGladdery and "I gave him my third roll of film with the I.D. photo of the striker who broke the glass this morning..." Mr. Ivers

identifies the formation of a "goon squad" which he advises "is being formed not only for harassment but physical damage to the company" and reports on its planned activities. In addition, the reports during the early days of the strike make reference to the attempts by the union to discover the location of the "secret" warehouse being used by the company during the strike.

14. The reports which were filed during the remainder of October and in November are not restricted to information related to the protection of company property and personnel. During this period Mr. Ivers was also reporting to the company on a number of his own activities, on bargaining issues and strategy, and on internal dissension within the union. Dealing firstly with the activities of Mr. Ivers. He reports on October 8th that he has listened to the "speeches and conversations" of John Fitzpatrick, the union's area supervisor, and believes that he is motivated by "a personal hatred of Mr. Goldhard, the company president, which has become a personal obsession... even at the cost of the men on the line." Mr. Ivers reports that:

*I have tried making remarks to these men that we might be better off with another union representative but only time will tell how far this subject will be pushed.*

(emphasis added)

- On October 9th Mr. Ivers reports on "a very heated discussion between Rochelle (Paris), president of the office union; the only member of the committee on hand, and quite a few of the strike members, *myself included*" at the end of which "Rochelle was in hysterics and almost crying." (emphasis added)

- Also on October 9th Mr. Ivers discloses his involvement in the circulation of a petition amongst a number of strikers demanding a face-to-face meeting with Mr. Fitzpatrick. He reports:

A petition has been drawn up to be given to John Fitzpatrick which demands a meeting in the near future to answer our questions as a body face-to-face with John Fitzpatrick. *We* want to know, not only what the hell is going on with the strike funds but we are tired of asking questions of four (4) committee members and getting four (4) different answers thus we want answers directly from him. *We* also don't want to be told that these rules apply by one (1) committee member and different set of rules be given *us* by another committee member. *We* want the union rules put down on paper, once and for all, in black and white, a copy of each to be given every union member. If these requests are not complied with *we* will contact the United Steelworkers Union of America requesting John Fitzpatrick be replaced by another union representative.

(emphasis added)

- Mr. Ivers reported on October 28th that he and three other men were involved in the throwing of eggs and tomatoes at a management employee.

- Mr. Ivers' involvement with the group of strikers seeking a meeting with Mr. Fitzpatrick is again referred to in the report of October 26th when he reports:

... Late this morning, alot of garbage hit the fan when certain members on the line, *myself included*, demanded of John Kelly, that he contact John Fitzpatrick, who we never actually see on the line any more, to inform him that we demand a general meeting in the very near future. This upset John Kelly very much and he stated more than once, in a very loud voice, that this is just exactly what the goddam company wanted, but that he would contact John Fitzpatrick and that *we* should have our goddam meeting in the near future.

(emphasis added)

- Mr. Ivers reported on October 31st,

As many as three (3) men with radios have been spotted on top of the roof doing surveillance of the picket line from that area. Ben Mucke, Peter Welechenko, Irene, a youth named Bill and *myself* hurled stones and obscenities at these men on the roof.

(emphasis added)

15. As noted, the parties were deadlocked on the issues of company-wide seniority and the geographic scope of the union's recognition at the time. Mr. Ivers reported that:

The men from Federal do not at this time, or did not even in the past really consider seniority to be one of the important issues. Seniority was put on such a high scale by employees of Automatic. The men in Federal feel there are alot of men in Automatic with ten (10) years or more with the company and if Automatic were to be let go all that seniority would accomplish would be to put alot of men in Federal out of work.

- He reported on October 26th that:

There is a lot of dissention on the line at this time re: Seniority throughout the plants. The statement previously made by Mr. Goldhart to the men on the line, stating that the money is on the table but he would in no way consider seniority through-out the plants, has been more than effective. Most of the men in Federal are beginning to believe that seniority through-out the plants, the first item of the union contract, is probably what is holding up the balance of the items listed and, in as much as Federal employees, on the whole, do not really give a damn about seniority throughout the plants, as it might well cost some of them their jobs, most of the men, at this time, want the union to remove item one (1) from the contract with the feeling that if this is done, the company might just go ahead with the remainder of the items listed.



- Mr. Ivers reported on November 6, 1981 that from his observations "one-third (1/3) or more of the men would return to work even under the old contract."

- Mr. Ivers reported on a union meeting which was held on November 18, 1981 during which the seniority issue was raised. He reported:

The point regarding article I in the contract was brought up. The men from Federal asked that this article be removed and an apprenticeship training course be submitted in its place, therefore eliminating hiring from outside and allowing a lower grade to try for any job posted. Fitzpatrick refused to remove article I. He stated it is too late now to enter anything new on the contract. Fitzpatrick further stated that an apprenticeship training class would definitely be put into the next contract. This in no way satisfied the personnel from Federal.

- Mr. Ivers reported on November 25, 1981 on the lack of cohesion between the office and plant groups. He reported:

At this time the meeting was closed. The tension among the men leaving was even higher than when we first went in.

16. Mr. Ivers also reported on internal union dissension and morale during this period. He reported on October 5, 1981 that:

The strike headquarters is actually in total confusion. No actual strike lines have been formed. The meeting of the ten (10) strike captains fell apart this morning when only four (4) showed up. The captains do not know who or even how many men are on their shifts. At times, there can be as many as fifty (50) or even sixty (60) on one (1) shift and only two (2) on the next shift. Kelly is spending more time with his goon squad than he is with actual formation of the men who are working the strike lines here, at 55 Brown's Line. With the exception of the goon squad, which is only about ten per cent (10%) of the men, most of the strikers are getting pretty fed up with the way the union is handling the strike.

- The October 9th report which has been referred to deals with both the heated discussion between Rochelle Paris, the president of the office local, and a number of strikers which concluded with Ms. Paris "in hysterics and almost crying", and the circulation of a petition to force Mr. Fitzpatrick to call a general meeting.

- Mr. Ivers reported on October 28, 1981 that:

John Kelly appeared on the line very upset with the night crew working last night from 12:00 midnight to 6:00 a.m. Kelly states that these men are the cause of most of the dissention coming from our side of the line. Most of these men have requested night duty because they feel they are not in the public eye or, especially, they are not

seen by the hierarchy of the company, while they are doing their picket duty. There has been a great deal of talk lately about these men, most of whom have quite a few years with the company, that they may be planning to walk across the line and back into the company. Kelly is now trying to break up this group of men by putting them on different shifts but he is finding it hard as most of the men refuse to do any other picket duty.

- He reported on November 2, 1981 that:

... A lot of the men are complaining that the picket line seems to be getting smaller but the paycheques do not get any bigger. To try to stop this dissension John Kelly is now telling everyone that there will be an extra five dollars (\$5.00) in our paycheques beginning with our next pay.

- Mr. Ivers advised on November 6th that in his view one-third or more of the men would return under the old contract. He reported:

This is not an easy situation for the company and, at times, the men feel we are out because of the union but the people who are really suffering, even though they voted to strike, are the men who, with families to support and very little money coming in and only really want to return to work, are beginning to realize how foolish their decision was to go on strike. These men are being told they are being lied to by the company. They are finding out that promises of up-coming meetings, and, with the share of the strike money coming through as it is and with other b.s. reasons that they are also being lied to by the union. Therefore, day by day, the number of men who just want to walk back in and return to work is increasing.

- Mr. Ivers reported on November 12, 1981 on the existence of a "new petition" signed by over 100 employees requesting a general meeting. Mr. Ivers reported that in response the union will be conducting seminars at strike headquarters for up to 20 strikers at a time.

- Mr. Ivers reported on November 14th that:

John Kelly has completely lost any control he may have had on the line. Apparently, there are more than one hundred twenty (120) names on the petition requesting a general meeting of all striking personnel. Kelly flatly refuses to hold a general meeting. He feels his up-coming seminars will be enough to quiet the men on the line.

He goes on to report that "the dissension is within all of the shifts."

- Mr. Ivers reported on November 18, 1981 that the tension among the men leaving a seminar attended by many of the Federal employees "was higher than when we first went in."

- Finally, on November 23rd, Mr. Ivers reported that in his view, Mr. Ron Summerville, a striking Federal employee, could lead the Federal employees back into work if he was a "little stronger". He reported:

The captain on the night shift that Kelly had so much trouble with is Ron Sumerville. Ron is now pulling the morning shift. With a little bit of guts, Ron could lead the Federal employees. Most of the men in Federal would listen to Ron and probably walk into the plant, if Ron were a little stronger. The only trouble is, he's all talk and no action.

17. The reports filed by Mr. Ivers on December 1st and 2nd and his oral testimony reveal that he assumed an active role in the dissenting group headed by Mr. Summerville and in particular, the presentation of the petition being circulated by Summerville requesting a general meeting. He reports on December 1, 1981:

I had a long discussion with Ron Summerville today. Apparently, the meeting held with forty-six (46) Federal people attending out of the fifty-one (51) who were asked to attend, only accomplished the fact that it gave the men a chance to blow off steam. Ron states that he still has the petition, requesting a general meeting of the union, signed by approx. one hundred forty (140) employees of the plant. I pointed out to Ron that just handing this petition to the union without an accompanying letter stating exactly how far we are willing to go to ensure the meeting would result in the petition being tossed aside as was our previous effort. *Ron has requested that I draft up a letter to accompany the petition. A copy of this rough draft accompanies this report.*

(emphasis added)

The letter drafted by Mr. Ivers, and submitted to Automotive with his report, is set below:

To: Mr. John Fitzpatrick

It is the responsibility of the President of the Union and the Committee members to work for the electoral body and act on the behalf of such. This does not include making decisions without this electoral body being consulted or even being considered, but does include acting upon requests made by members, singularly or in groups, of this electoral body.

Enclosed find a petition, signed by the majority of members of Local 7105 in good standing, still doing actual picket duty at 55 Brown's Line, requesting a general meeting be held prior to December 25, 1981. This request more than meets the requirements of Article VIII, Section 1, (to be found on page 65, lines 6-9 inclusive) of the Constitution - "The President shall call special meetings by request of ten (10) members in good standing of the Local Union...".



We, the signing members, presently recognize the negotiating committee as the only legal representative of our Union with the Company and will continue to do so as long as this committee acts upon our demands.

If, for any reason, this request for a general meeting is refused by Mr. J. Fitzpatrick and/or Mr. J. Kelly, we see no alternative but to speak directly with Mr. Patterson, of the Union Headquarters. *Should we not receive any satisfaction from Mr. Patterson, we will no longer acknowledge any committee, negotiating or otherwise, as acting on our behalf.*

*In the event that this occurs, we will form our own committee and hold our own general meeting, inviting select members of the Company. We are in contact with Company members who have assured us of their willingness to meet with us at our convenience, in any location selected by us.*

An immediate reply would be of benefit to both you and us, particularly you.

enclosure

copy to: Mr. John Kelly

The underlined portions were those deleted by Mr. Ivers on advice from Automotive.

18. Mr. Ivers reported on December 3rd that:

Re: The letter to accompany the petition – wording has been changed in the last paragraph. It now states that the company will be asked to meet with us, not that the company has already agreed to meet with us, as it is felt that the union may have used this against the company as bargaining in bad faith. The letter is to be produced in both English and Italian.

Two things holding us back at this time are: replacement ideas for plant-wide seniority and job evaluation as it is felt that the company will in no way negotiate with these two articles still on the proposal. Would it be possible for you, the company, to submit to me alternatives to these two proposals that I might feed back to the line?

19. Mr. Ivers testified that he signed the first petition but did not see the second. He acknowledged that he suggested that a covering letter accompany the petition and was asked by Ron Summerville to draft one. He testified that both Ron Summerville and the company thought that his draft should be changed because the union might read it as if the dissenting employees had already met with the company. He testified that the company's response was from "Mr. Ranny through Mr. McGladdery". Mr. Ivers acknowledged further that he had been asked by Mr. McGladdery to get close to Mr. Summerville to find out what he could about the feeling in Federal and to see if the

buildup of resentment was getting stronger. He testified that he was then told "to back off and get back in with the union people."

20. Mr. Ranny was asked his assessment of what was required to get the bargaining agent back to the bargaining table and replied "pressure on the union". He then replied in the affirmative when asked if he was interested in knowing about pressure being put on the union by its members. However, Mr. Ranny maintained throughout his testimony that he received the necessary information from striking employees who communicated with the company foreman and that he did not require the information provided by Mr. Ivers in this regard. Mr. Ranny did not testify as to who these employees were and, furthermore, he never suggested to Mr. Ivers or to Securicor that Mr. Ivers limit his reporting to matters related to the protection of the company's property and its personnel. Furthermore, when asked why he met face to face with Mr. Ivers on February 10th (the third face-to-face meeting between the two) he replied that "Mr. Ivers was getting too far away. I wanted him closer to know what was going on - closer to Kelly." Mr. Ivers testified that he had been trained to report on anything that might be of any interest to the client and therefore he took it upon himself to report on many of the matters that he did.

21. Mr. Ivers continued to file daily written reports in the period December 3, 1981 until he was removed from the picket line on February 17, 1982. These reports, although they deal with some matters related to the protection of company property, became increasingly concerned with bargaining issues and strategy and dissension within the union. It is to be observed at this juncture that the strike was essentially a peaceful one. There were no arrests nor were there any charges laid against strikers nor was there any call for police intervention. Mr. Fitzpatrick testified that the union continually cautioned its members to respect the law and to conduct themselves in a peaceful manner.

22. Rather than analyze the reports filed by Mr. Ivers subsequent to December 2, under the headings of direct interference, bargaining issues and strategy and internal union dissension, as we did in respect of the reports filed in October and November, a chronological review of the December, January and February reports provides a better insight into the focus of Mr. Ivers' undercover activities during this period. Furthermore, many of the items contained in Mr. Ivers' reports during this period relate to all three of the headings used earlier.

23. Mr. Ivers reports on December 4, 1981 that both he and Ron Summerville are "planning to break every rule put out by the outside shift captain on the first scheduled shift which is Monday December 7, 1981." He reports on December 5th that:

We are trying very hard to bring two (2) men over to our cause, Bill Barrie and John Martin, because both of these men have knowledge of union proceedings. Both of these men, at this time, are fence sitting and we are hoping to bring them with us.

If the union replies to our request for a general meeting there will be a meeting of our own headed by a committee of five (5) selected by us. We hope to have both Bill Barrie and John Martin along with a union representative from another area who hates Kelly. These three

(3) men will be requested to act in the place of Kelly and Fitzpatrick during this meeting. Their job will be to shoot down any questions we may fire at them, and to assist us in presenting these questions properly at the general meeting.

I have been requested by Ron Summerville to attend all upcoming meetings on behalf of this group.

Any help from you at this time would be appreciated.

- Mr. Ivers advises the company on December 9, 1981 that there has been discussion on the line of the possibility of "the members of the line coming to their own agreement even if only those involved on the line are from Federal."

- Mr. Ivers reports on the same day that:

Knowing I would get Kelly mad, I stated the following, "That most of the men on the line feel as I do that Kelly, with the classes that he has taken and the experience he is getting could be an excellent president for any union if it weren't for the fact that he is a suck." I explained to him that we all felt he is looking for a job at Cecil Street, that he would do anything for anyone from Cecil Street, and that he is Fitzpatrick's 'Joe-boy'.

- Mr. Ivers reported to the company on January 11th that the bargaining committee was meeeting at the union office to discuss "a re-evaluation of contract demands."

- Mr. Ivers reports on January 13th that Mr. Kelly and Mr. Fitzpatrick "had one hell of an argument" as to whether the striking employees who were working at General Aviation during a strike there should be allowed to participate in the Automotive strike. He reports that "this is the first time a verbal disagreement between these two (2) has taken place in front of witnesses."

24. The company made its first monetary offer to the union on February 1st and then made application to the Minister under section 40 of the Act on February 4, 1982 for a vote amongst the striking employees as to the acceptance or rejection of the offer. The employees were served with notice of the employer's last offer on February 15th and the vote was conducted on February 22nd. The reports of Mr. Ivers and his activities during this period must be reviewed against the backdrop of the bargaining strategy that was adopted by the company.

- Mr. Ivers reported on February 1, 1982 that:

The three (3) main issues being discussed at this time on the line re: any proposal brought out by the company are: money, pension and a proper grievance procedure.

- He reported on February 3, 1982 as follows:



This morning, John Kelly made a statement to approx. thirty (30) members inside the strike headquarters re: the proposal put out by the Company. Kelly's speech lasted approx. twenty (20) minutes. His whole oratory was based on what he claims to be the three(3) major facts:

1. The wages offered are compatible with those of Swansea.
2. The pension is to be increased by \$1.00
3. No other real benefits were offered in anyway.

When asked if this proposal is to be brought to the membership for a vote, Kelly stated the negotiating committee feels the contract is not worth bringing to the membership. Kelly further states that a counter proposal is being made up at this time to be presented to the company. If the counter proposal is not accepted by the company and if the company is not willing to negotiate to somewhere within the two (2) proposals then and only then will the proposal from the company be brought for a vote to the membership.

25. Mr. Ranny met with both Mr. McGladdery and Mr. Ivers at the Weston Golf and Country Club in the early afternoon on February 3, 1982; the day before making application for the final offer vote under section 40 of the Act. Mr. Ranny acknowledged that Mr. Ivers was informed that the company was going for a final offer vote and testified that Mr. Ivers thought the Federal employees would vote for the contract. He denied that Mr. Ivers was asked to become involved in a pro-vote campaign. When Mr. McGladdery was asked what had been discussed at the February 3rd meeting between himself, Mr. Ivers and Mr. Ranny, he testified that he could not recollect. Mr. Ivers testified that the February 3rd meeting was "mostly social" and that the discussion as it related to the strike centered on the people working at the airport. When asked if he reported verbally to Mr. Ranny on the union strategy in response to the offer, he admitted that Mr. Ranny asked him to find out Rachelle Paris' position with respect to the proposal. Mr. Ranny left the meeting with Messrs. Ivers and McGladdery to attend a meeting with his labour lawyer who then filed the application for the final offer vote the next day.

26. The reports which followed the February 3rd meeting deal at great length with the union's response to the company's offer and with the perception of the company's offer by the striking employees.

- Mr. Ivers reported on February 4, 1982 that:

Meetings are being held daily with the crews on the line. Kelly is explaining to them that the package offered by the company includes wages only. He is further explaining that we are not out on strike for wages but for benefits and working conditions. Kelly seems to be really pushing the need for better life insurance, better health and dental plans and, in particular, a better COLA. Kelly is persuading the men that paying out more money to us in wages does not

compensate for the increased cost of drugs and medical care. Kelly is further stating that in the next few weeks we will all have to stick together far more than we have in the past eighteen (18) weeks. Most of the people on this line are followers, not leaders and, it seems to me, that they will follow whoever it is who is talking to them at the moment, re: contract.

Mr. Ivers' report of February 5, 1982 is reproduced in its entirety as follows:

7:00 a.m. Arrive on the line.

John Kelly's meetings with the men in the strike office continue.

Kelly's first topic of discussion is holiday time reduced. Kelly says that the union is really pushing to have the number of years required reduced severely for three(3), four (4) and five (5) week holiday periods.

Item number two (2): a company paid supplement to each striking member for money lost in the amount of approx. two thousand dollars (\$2,000.00) per man.

Item number three (3): environment. better working conditions and safety margins to be taken. Also a fifteen (15) minute coffee break, morning and afternoon, even if it means shutting down machinery.

The subject of job security was brought up by someone. The men from Federal state that job security throughout the entire plant is not being requested on behalf of themselves and they no longer feel it to be an issue, important enough to be out on strike for. Kelly states that the union has drastically changed the original job security proposal in the original contract, that the union is now only asking for seniority within departments. Kelly further states that the company is not willing to discuss job security in any form.

The only item overly discussed for any length of time during this meeting was that of job posting. It appears a large number of the strikers, not only in Federal, find that only being able to post up in grade is not sufficient. The posting across, such as one gr. 8 posting for another opening of a gr. 8, is an item which the men seem to feel they would like to have in the contract but which is not vital. Most of the employees feel that being able to post down is very important; in particular those with many years service who feel that posting down to a lighter job for the balance of their time until retirement is a vital issue to be added to the contract. Kelly states that this subject will be added to the counter offer to be given to the company.

11.00 a.m.

Left for Securicor offices. Written and oral reports were given to Mr. McGladdery.

12.00 p.m. Off duty.

- Mr. Ivers reported to the company on February 8th the comments made by Mr. Fitzpatrick in response to each of the items contained in its offer. He also advised the company that he was "gathering information from Rochelle as instructed." He reported:

Re: Gathering information from Rochelle as instructed: Rochelle feels that the offer made to the office staff is pure garbage. From what Rochelle says, all office personnel feel the same as she does. Rochelle states she has one (1) major fear - that is, if the three (3) plants vote and accept their contract as is, her people, because of their lack in number, will be forced to accept their contract offer. Rochelle was almost in tears as she explained this to me. There was a violent argument between good old George, Rochelle and Kelly with regards to Rochelle's fears of what will happen in the future.

- Mr. Ivers reported to the company on February 10th that:

Fitzpatrick is hoping to receive word this afternoon, re: the possible date for the forced vote by the Labour Board on behalf of the company. Fitzpatrick really wants to ensure that, if a date is to be set, that this date is to be after the charges against the company have been heard. One of Fitzpatrick's biggest fears, at this time, is that a separate vote may put one local against another. There is to be a closed meeting today at 1:00 p.m. of the negotiating committee here, at the strike office.

27. Messrs. Ivers and McGladdery again met face to face with Mr. Ranny on February 10, 1982 for about 2 hours. Mr. Ranny testified that he called the meeting because Mr. Ivers was getting too far away from Kelly. He testified that he wanted him close to Kelly so that he would know what was going on. Mr. McGladdery could not recall the meeting. Mr. Ivers testified initially that he could not remember what was discussed on February 10th but then testified that he had discussed "people breaking in and leaving signs around."

28. Mr. Ivers reported on February 11th that the members who are working at the airport have "become totally anti-union in every way and therefore, anti-Kelly." He reported on February 15th that:

The attitude of the people to whom I have talked is that of confusion. Many would like a better contract but, at the same time, realize that they must return to work in the near future.

Mr. Ivers' reports on February 16th and 17th pertain to the hearing which was being



conducted in this matter before the Board. He was relieved of his undercover responsibilities on February 17th and did not return to the picket line.

29. One further aspect of the reporting activity of Mr. Ivers deserves comment. Mr. Ivers reported to the company on the efforts of the union to stop the flow of goods from its plant and to locate the warehouse from which it believed the company was shipping product during the strike. Mr. Ivers contacted Mr. McGladdery by phone at his home on November 28th to advise him that there would be no one on the picket line or at the strike office between 3:00 and 6:00 a.m. He suggested that Mr. McGladdery contact the company in case it wished to move goods or equipment in or out of the plant during this period. Furthermore, Mr. Ivers reported to the company on such matters as where striking employees were working and who was supplying wood and food to the picket line.

30. The Board heard a great deal of evidence from members of the bargaining unit in respect of attempts by Mr. Ivers to provoke striking employees to break the law and of actions taken by Mr. Ivers which were in violation of the law. In his evidence Mr. Ivers denied that he had said or done most of what had been attributed to him. By his own admission, however, Mr. Ivers threw tomatoes and eggs that hit a managerial employee of the company, threw rocks at company personnel on the roof of the plant, on two occasions put nails under the tires of cars parked nearby or attempting to enter the plant, counselled striking employees to climb the fence and trespass on company property for the purpose of leaving signs within the company's property and agreed with striking employees that the railway tracks leading into the rear of the company's property should be greased or taken up. Mr. Ivers explained that he had to do these things in order to protect his cover. He was never told not to involve himself in this way by either Automotive or Securicor.

31. We now turn to a review of the collective bargaining activity between the parties. As we have observed, it became apparent to both sides after only a few meetings that the issues between them would not likely be resolved without a strike. The union had taken the decision to push for a number of fundamental language changes which the company was determined to resist. The major non-monetary issues of common seniority and job posting between plants and the geographic scope of the union's recognition have been discussed at paragraph 5 herein. Furthermore, the major components of the monetary package had traditionally been patterned on the settlement negotiated at Stelco and the parties to that relationship were engaged in a bitter strike in the fall of 1981. The Stelco strike was not settled until early December, 1981. Given the feeling on both sides that a strike was inevitable, the preparedness of both sides to hold to their respective positions on the non-monetary issues and the absence of a Stelco pattern, it is not surprising that very little progress was made in negotiations during the first three months of the strike. The parties were deadlocked through October, November and December.

32. The first move of any substance towards resolving the deadlock was made by the union on January 5, 1982. The union moved off its demand for common seniority between the three production units and proposed that the existing seniority units be maintained but that all members be given the right to bid on jobs outside of their seniority unit when there are no members within the seniority unit where the vacancy exists to fill the job. In the case of layoff, the union proposed that any member who was

about to be laid off could claim the work of the lowest seniority employee in any of the three units provided he had the ability and physical fitness to perform the work. While the union's proposal would create significant mobility between units, which had heretofore never existed, it nevertheless indicated for the first time some flexibility on the union's part. Mr. Frank Reid, the company's vice-president of operations at the time, since retired, although testifying initially that no positive signals were received from the union, agreed that positive signals were received from the union on January 5 - 6 and 14th.

33. Automotive did not formally reply to the union until February 1, 1982 at which time a full proposal for settlement was made. The employer proposal maintained the status quo in respect of the non-monetary issues but offered improved monetary terms along the lines of those incorporated into the Stelco settlement. This was the proposal which Automotive, after meeting with Mr. Ivers and Mr. McGladdery at the Weston Golf and Country Club on February 3, 1982, made the subject of an application for a last offer vote on February 4, 1982.

34. Mr. Reid, who acknowledged in his testimony that Mr. Ranny had pointed out items in Mr. Ivers' reports related to the strength of the strike and the desire of some of the strikers to return to work, testified that Automotive believed that over fifty per cent of the rank and file were interested in going back to work. When asked if Mr. Ivers' reports assisted in making this determination, he replied that they were one of the factors considered. He testified that the employer received information in this regard from other sources as well but he could not name any of these. The vote did not take place until February 22nd, some four days after Mr. Ivers was identified as an undercover investigator working for Automotive. The striking employees voted by a large majority to reject the company's offer.

35. Negotiations between Automotive and the union did not recommence until March 11, 1982. Messrs. Gilchrist and Taylor from the union's regional office, became actively involved at this time. Although very little progress was made during the week of March 11th, the union indicated that it was prepared to drop its demand for the "Co-operative Wage Study" (CWS) ranking of jobs which it had been seeking for a number of years. CWS is the method of job evaluation and ranking found in many steelworker contracts including that at Stelco. Mr. Lynn Williams of the union's international head office met with Mr. Goldhardt, the company's president, on March 16th and became involved in negotiations on March 22nd. The parties began to make progress at this juncture and were successful in concluding a memorandum of settlement on April 15, 1982. Under the terms of the Memorandum the company agreed that if it moved any of its operations located at 55 Brown's Line elsewhere within Metropolitan Toronto or within a 50 mile radius of 55 Brown's Line, any employee of the company would have the right to transfer to the new location with full seniority and the terms and conditions of the collective agreement would apply at the new location. The company also agreed to a number of seniority related changes including the company-wide posting of vacant jobs in Federal Bolt and the consideration of qualified Automotive Hardware and Automatic Screw Machine employees for these jobs, the maintenance of a master recall list with recall rights exercisable in any of these plants and the right to move with one's job if the company transferred any machinery or an operation from one unit to another. The terms of the monetary settlement reflected the Stelco pattern. Mr. Fitzpatrick had stated that the union would drop the complaint against Automotive in

this matter in return for Automotive's agreement to institute the CWS plan. However, Automotive refused and, in Mr. Fitzpatrick's words, the union got a few little things in return for its agreement to seek leave to withdraw against Automotive. The memorandum of settlement along with the decision to seek leave to withdraw against Automotive in this matter were ratified by the union membership on April 22, 1982.

### Argument

36. The union asks the Board to find that Mr. Ivers violated the Act when he attempted to "set up" Mr. Kelly prior to the strike and when he counselled and committed unlawful acts while posing as a striking employee on the picket line. The union argues that these activities constitute interference with the administration of the trade union contrary to section 64 of the Act. The union argues further that it must be inferred from the context of the reports and the failure of either Automotive or Securicor to put a stop to his extensive reporting on legitimate union affairs that Mr. Ivers was planted within the union, not just to provide information with respect to the protection of company property, but also for the purpose of supplying information pertaining to the legitimate strike activities of the trade union. The union maintains that, in the face of the reports and in the face of evidence that no attempt was made to limit the reporting of Mr. Ivers, there is a heavy onus on the employer to show that it did not intend the consequences of its actions. The union maintains that this onus has not been discharged. The union, citing *Robin Hood Multi Foods Inc.*, [1981] OLRB Rep. July 972, *Skyline Hotel*, [1980] OLRB Rep. Dec. 1811 and *Radio Shack*, [1979] OLRB Rep. Dec. 1220, argues that it is unlawful for an employer to plant a spy within the union, whether an employee informer or a paid professional undercover investigator, as Mr. Ivers was, for the purpose of interfering with either the organization or the administration of a trade union. Where, as in this case, the employer and its agent Securicor have used the services of a professional investigator to infiltrate the ranks of the trade union to act in a manner that makes it more difficult for the union to administer a strike and to report back to the employer on legitimate trade union activities, the union asks the Board to find that "flagrant violations" have taken place.

37. The union asks for extensive remedies to be applied against the respondent Securicor in this matter. The union takes the position that the activities of Mr. Ivers and the information he was feeding to the company caused the struck employer to prolong the strike rather than negotiate a settlement with the complainant trade union. The union argues that the failure of the employer to respond to the revised position of the union which was communicated to the employer on January 14, 1982, and instead to move towards a final offer vote after digesting his reports and conferring with Mr. Ivers, is strong evidence of the impact of Mr. Ivers' unlawful activities on the conduct of the negotiations. The union maintains that following the discovery of Mr. Ivers as an undercover agent and the vote by the employees to reject the employer's offer, three weeks of hard bargaining was required to end the impasse. In these circumstances, the union takes the position that the striking employees lost the opportunity to earn their livelihood from January 14, 1982 as a result of the unlawful activities of Mr. Ivers. The union maintains that the amount of compensation owing should be apportioned equally between Automotive and Securicor and, having withdrawn against Automotive, Securicor should be directed to reimburse the striking employees for one half of the wages they would otherwise have earned in the period January 15, 1982 to the conclusion of the strike, less the amount that would not have been paid during the three weeks of hard



bargaining in April that was required to resolve the dispute. The union also asks to be reimbursed from Securicor for one half of the strike pay paid by it to the striking employees during this period. Finally, the union asks to be reimbursed from Securicor for the strike pay if paid to David Ivers.

38. In addition to the remedies set out above the union asks for a declaration that Securicor has violated the Act, an order directing Securicor to cease and desist from future violations of the Act, an order to cease and desist from future involvement in unfair labour practice activity in the province, and finally, an order to Securicor to publish an acknowledgment of its violations of the Act, and an apology to the complainant, (both in language to be fixed by the Board) in the form of quarter page advertisements to run for one week in the *Globe and Mail*, the *Toronto Star* and the *Toronto Sun*.

39. Securicor maintains that because Mr. Ivers never provoked anyone to do anything, and because nothing illegal was ever done at his suggestion, it must be found that he was not an "agent provocateur" as is claimed by the union. Securicor argues that Automotive was entitled to protect its property and that because Mr. Ivers was retained for this purpose he was on the picket line for a legitimate reason and could therefore report his observations to the employer. Securicor cites both *Canada Cement Lafarge*, [1980] OLRB Rep. Nov. 1583 and *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Jan. 60 in support of the proposition that an employer is permitted to engage in surveillance in order to protect its property. Securicor argues that on a close review of the evidence it must be found that Mr. Ivers did not interfere with the legitimate activities of the trade union. Securicor points to the deep splits within the union prior to the arrival of Mr. Ivers and the employer's knowledge of these splits prior to his arrival; the role played by Mr. Sommerville in legitimately fostering dissent within the union and his leadership role in the preparation and circulation of the employee petitions; the absence of any evidence of improper acts by Mr. Ivers in connection with the decision to apply for a last offer vote or in connection with the conduct of that vote; and Mr. Ivers' lack of access to secret information emanating from the union's bargaining committee or executive, in support of its position that Mr. Ivers did not interfere with the legitimate activities of the trade union. Securicor distinguishes both the *Radio Shack* and *Skyline*, *supra* cases on the grounds that the surveillance activity of Mr. Ivers in this case was directed at the protection of company property and not at the identification and termination of trade union supporters.

40. Turning to the provisions of the Act which the complainant alleges have been breached, Securicor, while acknowledging that it acted on behalf of the employer, maintains that it did not interfere with the trade union. Securicor argues that if there was any interference it was as the result of the response of the employer and not as the result of the filing of reports by Mr. Ivers. If there was a breach of section 64, therefore, it was committed by Automotive and not, it is argued, by Securicor. In response to the allegation that it breached section 66(c) of the Act, Securicor maintains that there is nothing in the evidence about any threats having been made by it. Similarly, in response to the allegation that it breached section 70 of the Act, Securicor argues that there is nothing in the evidence to support the conclusion that it engaged in acts of intimidation, coercion, or compulsion. Furthermore, Securicor maintains that the involvement of Mr. Ivers in the Automotive strike and the reports he filed in connection with it would not have an ongoing coercive impact which would have the effect of compelling persons to

refrain from exercising rights under the Act. Securicor repeats its argument, dealt with in the Board's earlier decision, that the complainant, having withdrawn against Automotive, cannot proceed against Securicor as the agent of Automotive, and that in these circumstances the Board is without jurisdiction to hear the complaint against Securicor.

41. Securicor argues that even if the Board finds that its involvement in the Automotive strike was inherently unlawful, the best that the complainant can hope for is declaratory relief. Securicor argues firstly that if the Board finds its involvement to have been inherently unlawful it will be breaking new ground on the basis of actions which were known and condoned by two sets of police. In these circumstances, it is the position of Securicor that monetary damages would not be appropriate. Securicor argues secondly, that the evidence pertaining to the bargaining impasse does not support the conclusion that the activities of Mr. Ivers in any way prolonged the strike. Securicor maintains that where the first move by the union on January 15, 1982, some three and one half months after the commencement of the strike, is a tentative gesture at best and is followed by a full monetary proposal on February 1, 1982, which was put to a final offer vote on February 22nd, it cannot be argued that there has been any unwarranted delay. Where bargaining recommences on March 11th and continues on an ongoing basis until agreement is reached on April 15th, Securicor maintains that the complainant cannot rely on delay in support of its claim for monetary compensation. Securicor argues thirdly, that the union, in resolving the collective bargaining impasse, negotiated what it thought it should get from Automotive in compensation for the activities of Mr. Ivers and, accordingly, any direction to Securicor to pay monetary damages to the complainant union would be punitive in nature.

42. The complainant trade union acknowledged in its reply submissions that it was focusing on an alleged breach of section 64 of the Act. Section 64 makes it an offence for an employer or anyone acting on behalf of an employer to interfere with the administration of a trade union or to interfere with the representation of employees by a trade union. The union argues that section 64 protects its ability to administer a strike, including the conduct of its members on the picket line. Where Mr. Ivers verbally attacked union officials in public, assisted a third column within the union, attempted to undermine the coherence and unity of the union and acted on the picket line in a manner not condoned by the bargaining agent, the union asks us to reject Securicor's position that it did not violate section 64. Furthermore, where the undercover agent reports on unity within the bargaining unit, and on the bargaining positions which he believed certain segments of the bargaining unit would accept, is available to disseminate misinformation and to comment from inside on the leadership of the union and the relationship between the leadership and the membership it is argued that there exists a *prima facie* violation of the protection extended to the union under section 64 of the Act to represent employees free from the interference of the employer or anyone acting on behalf of the employer. The union maintains that infiltration of the union in the manner carried out by Mr. Ivers is a violation of section 64 of the Act and any question as to what limits exist upon the activities which an undercover agent can engage in in these circumstances is moot because, the infiltration is done in secret and therefore, there is no way of knowing what the infiltrator is doing. The union argues that a finding that undercover infiltration of a trade union by an employer or someone acting on behalf of an employer is an unlawful activity does not in any way abridge the employer's right to protect his property during a strike where he is free to use guards, summon the police or seek an injunction.

### Decision

43. The Legislature of this province has declared in the preamble to the *Labour Relations Act* that, "it is in the public interest of the province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees." The right of employees to join together to select a bargaining agent of their choice and to be represented by that bargaining agent in an arm's length collective bargaining relationship with their employer is established and given effect under the Act by the certification procedures contained therein and by the statutory protections afforded employees and trade unions in the exercise of their rights under the Act.

44. The Board is given the authority under the Act to certify a trade union as the exclusive bargaining agent for a group of employees and in so doing determines if the organization seeking to become certified is a trade union within the meaning of the Act, determines the grouping of employees that is appropriate for purposes of collective bargaining and determines the extent of employee support for the trade union within the bargaining unit. Where the Board is satisfied that the organization seeking to become certified is a trade union within the meaning of the Act and has the support of a majority of those in the bargaining unit, it is entitled to be certified as the exclusive bargaining agent for all of the employees in the bargaining unit and to bargain for a collective agreement on behalf of these employees.

45. The collective bargaining process established under the Act recognizes that the parties are motivated by self-interest and, concomitantly, provides the means to resolve the inevitable differences that arise between the parties to a collective bargaining relationship. The granting of the right to strike or lock out is designed to serve this purpose, thereby providing the underpinning to the process. As the Board commented in *Canada Cement Lafarge, supra*, "It is the threat of economic harm to both sides that lies at the centre of collective bargaining encouraging the parties to come to agreement and to avoid such costs." Given the recognition of self-interest and the nature of free collective bargaining it is not surprising that the Act is also designed to create a relationship which is both at arm's length and exclusive. These are hallmarks of a collective bargaining relationship that require emphasis in the context of this case.

46. There is a broad discretion vested in the Board under section 1(3)(b) of the Act to determine who "exercises managerial function or is employed in a confidential capacity in matters relating to labour relations." The Board exercises its discretion under the section in a manner designed to create and preserve the essential arm's length relationship between an employer and a trade union and to thereby maintain the integrity of the collective bargaining process. The Board summarized the considerations which underlie the exercise of its discretion under section 1(3)(b) in *Inglis Limited*, [1976] OLRB Rep. June 270 as follows:

Collective bargaining by its very nature requires an arm's length relationship between two sides whose interests, objectives and priorities are often divergent. It is critical in striking a bargain which is fair to both sides that the process elicit an open and exhaustive



discussion of the respective objectives and priorities and that where these are in conflict the supporting rationale be advanced by persons whose loyalties are undivided. It is further imperative that the acceptance or rejection of whatever agreements arise from the bargaining process be made by persons of undivided perspective and that the subsequent on-going administration of the accepted bargain be by persons having a clear duty to one side *or* the other. The effective operation of the system of labour relations which presently exists in this jurisdiction is based on an underlying recognition of the inherent differences between the employer and the employees and the need for an arm's length relationship between the employer, as embodied by those who exercise managerial function or are employed in a confidential capacity in matters relating to labour relations, and the employees.

47. The second hallmark of a collective bargaining relationship under the Act to which we have made reference is the exclusivity of the union's bargaining rights. Once a trade union has become certified as the collective bargaining agent for a unit of employees, no other trade union may represent these employees and the employer must deal with the trade union in respect of the terms and conditions of employment of all of the employees in the bargaining unit. The employer can no longer deal directly with individual employees. The exclusivity of a union's bargaining rights has been given unqualified judicial approval. In *Re Syndicat Catholique des Employes de Magasins de Quebec Inc. v. Compagnie Paquet Ltee*, [1959] S.C.R. 206, 18 D.L.R. (2d) 346, the Supreme Court of Canada stated:

The union is, by virtue of its incorporation under the *Professional Syndicates' Act* [R.S.Q. 1941, c. 162] and its certification under *The Labour Relations Act* [R.S.Q. 1941, c. 162A], the representative of all the employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee.

In *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, [1975] 5 W.W.R. 44, 75 CLLC ¶14,277, 54 D.L.R. (3d) 1, Laskin C.J.C., speaking for the majority in another judgment of the Supreme Court, stated:

The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto.

(See also *Winnipeg Police Association and City of Winnipeg*, [1979] 5 W.W.R. 193.)

48. The wide-ranging prohibitions contained in section 64 of the Act serve to ensure an arm's length relationship between employer and union and to protect the exclusivity of the union's bargaining rights. Section 64, without restricting the right of an employer to express his views as long as he does not use coercion, intimidation, threats, promises or undue influence, prohibits an employer or anyone acting on behalf of an employer, from participating in or interfering with the formation, selection or administration of a trade union, from interfering with the representation of employees by a trade union or from contributing financial or other support to a trade union. It is to be observed that in the context of a mature bargaining relationship where the complaint relates to the conduct of a person acting on behalf of an employer during the course of a lawful strike, the prohibitions against interfering with the administration of a trade union and the prohibition against interfering with the representation of employees by a trade union are central to our inquiry. Where the right to strike is at the heart of the process by which a trade union represents its constituents, and where the exercise of the right carries with it the responsibility to administer the strike, allegations of conduct designed to undermine the arm's length relationship during a strike or to subvert the exclusivity of the union's bargaining rights by dealing directly with the employees in the bargaining unit must be scrutinized in light of the prohibitions contained in section 64 of the Act.

49. The statutory direction to the Board in section 13 of the Act not to certify a trade union if an employer or employers' organization has participated in its formation or administration or has contributed financial or other support to it, the duty to bargain in good faith and make every reasonable effort to conclude a collective agreement under section 15 of the Act and the further statutory direction in section 48 of the Act that an agreement between an employer and a trade union shall be deemed not to be a collective agreement if the employer has participated in the formation or administration of the trade union or has contributed financial or other support to the trade union, are sections designed to preserve the essential arm's length nature of the collective bargaining relationship.

50. Before reviewing the conduct of the respondent in light of the prohibitions contained in section 64 of the the Act a review of the relevant jurisprudence is in order. In *Radio Shack, supra* the Board was faced with an employer who hired two persons to infiltrate a trade union that was attempting to organize its employees in order to obtain information about its organizing activities. A third person was subsequently hired "to infiltrate union meetings and to observe who was organizing the plant." The Board, with very little elaboration, found that the hiring of these persons "to obtain information about the union and its supporters amount to a flagrant violation of sections 56, 58 and 61 (now sections 64, 66 and 71) of the *Labour Relations Act*." The Board went on to find in the *Radio Shack* decision that:

These actions, without rebuttal testimony, must be seen as going hand in hand with the termination of two employees and the threat of plant removal which the Board, in earlier proceedings, also found to be in violation of the Act. We have difficulty in imagining conduct that could be in greater conflict with an employer's obligations not to interfere with the selection of a trade union (section 56) and not to intimidate employees exercising their rights under the Act (sections 58 and 61). Even if the employees lacked the knowledge that they were being watched and reported on, we are of the opinion that

surveillance activity can only have purposes of aiding an employer in “interfering” with the selection of a trade union and in “coercing” and “restraining” employees from engaging in protected activity and with these purposes, constitutes a *per se* violation of sections 56, 58, and 61 of *The Labour Relations Act*. See *Grower-Shipper Vegetable Association of Central California*, *supra* at page 61,807; *Bethlehem Steel Company et al*, *supra* at page 61,440; *The Atlas Underwear Company*, *supra*; and *The Ohio Power Company*, *supra*.

51. In *Re Robin Hood Multi Foods*, *supra*, the employer approached an employee during the course of an organizing campaign and told the employee that it would make it worth his while to approach the union’s organizers, express interest in the trade union, find out about the union and relay information about the union’s organizing activities back to the employer. Again, without elaboration, the Board found that the use of the employee “to infiltrate the union to obtain information about it, including the names of the organizers”, constituted a violation of what is now section 64 of the Act. The Board also found that the following employer initiatives involving this employee were in breach of section 64 of the Act.

• • •

- (2) granting Mr. Gozzard time off work for the purpose of meeting with a union organizer for the purpose of obtaining further information for the respondent about the union organizing campaign;
- (3) authorizing Mr. Gozzard to extend his breaks and take extra breaks in order to discuss the union with other employees;
- (4) expanding Mr. Gozzard’s hours of work for purposes which included providing him with greater access to employees in order to better effectuate his anti-union activities and as a financial reward therefor;
- (5) directing Mr. Gozzard to post on the Company bulletin board inflammatory newspapers clippings which related to a local strike that involved an unusual degree of violence and property damage;

• • •

52. The extent of an employer’s right to protect his property, as Securicor claims was being done in this case, in the face of the prohibitions contained in section 64 of the Act was dealt with by the Board in both *Skyline*, *supra* and *K-Mart*, *supra*. In the *K-Mart* case the employer, during the course of the union’s organizing campaign engaged in the physical surveillance of the union’s leaders. The Board described the employer’s activities in this regard “as a ruthless campaign of surveillance that endured for some three weeks” during which these two employees were openly followed wherever they went within the work place. Ordinarily, the surveillance of the work place by an employer who operates a retail business would fall within his right to protect his property. However, where



surveillance is used to intimidate employees and to chill free expression as in the *K-Mart* case, it will be found to be in breach of section 64 of the Act. The Board commented in *K-Mart* as follows:

Surveillance can have a legitimate application in the work place. An employer may, for example, have to use one form or another of surveillance to protect its property against theft and vandalism or to monitor machinery and processes to ensure the safety of employees. In Ontario, however, an employer may not use surveillance to intimidate employees from exercising their rights under *The Labour Relations Act*.

53. In the *Skyline* case the employer instituted elaborate security measures which it maintained were designed to prevent the harassment of its employees by union organizers. The employer went so far as to provide an escort service for its employees between the Hotel and the nearest bus stop. The Board commented:

The right of an owner to take steps for the adequate security and control of his premises is, of course, a *prima facie* incident of ownership, and not one to be lightly interfered with by a labour relations tribunal. On the other hand, *none* of the measures complained of by the applicant were in effect prior to the emergence of the applicant's campaign, and, apart from a less than credible claim on the part of Mr. Elsayed, the respondent can scarcely argue that the measures adopted were inherently necessary to the normal operation of the hotel facility. The respondent, in fact, does not argue that. Rather, the justification primarily put forward is that the security measures were simply a response to what the respondent considered to be improper organizing activities by the applicant and its agents. The respondent, in other words, admits (as, on the evidence, it must) that all of the measures in dispute were designed in one way or another to restrict the organizing activities of the applicant, as they did. This does not necessarily make the respondent's conduct unlawful. What it does, rather, is bring squarely into issue the interpretation which the Board must give to section 56 of *The Labour Relations Act*.

The Board found that where it is established on the balance of probabilities that the motive of an employer in instituting security measures is to interfere with the rights of trade unions and employees, these initiatives are in breach of the Act. The Board found that all of the security measures adopted by the respondent in the *Skyline* case were in response to and designed to thwart the applicant's organizing efforts and, therefore, were in violation of what is now section 64 of the Act and, in overall impact, in violation of what is now section 70 of the Act.

54. The National Labour Relations Board has dealt extensively with the use of undercover operatives within the employee rank and file for the purpose of obtaining information with respect to the trade union activities of rank and file employees. Under Section 8(a)(1) of the *National Labour Relations Act* an employer (or anyone acting on

behalf of an employer) is forbidden to interfere with, restrain, or coerce employees in the exercise of their right under section 7 of the *National Labour Relations Act*, to form, join or assist labour organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining. These sections of the *National Labour Relations Act* are designed to provide essentially the same protection as that afforded under section 64 of our Act. The consistently held position of the National Labour Relations Board with respect to employer infiltration of trade unions, is summarized in *Re Wallace Press Inc.* 56 LRRM 1037, (1964) as follows:

Few propositions are more firmly embedded in the law of labour relations than that an employer who spies upon the union activities of his employees engages in a flagrant violation of the rights guaranteed by section 7 of the Act. Such conduct has been condemned by the Board and the courts since the early days of the Act, for experience has shown that employers resort to labour espionage or surveillance for the purpose of obstructing and destroying employees' self organizational rights and activities. If such first steps leading to discriminatory practices are outlawed, the commission of other unfair labour practices may be thwarted.

(See also *Harvey Aluminum Inc.*, 51 LRRM 1288 (1962).)

55. The earliest reported American case dealing with the use of undercover agents to infiltrate the rank and file is *Freuhauf Trailer Co.*, 1 LRRM 275 (1935), enforced in 1 LRRM 715 (1937) U.S. Sup. Ct. In that case the respondent employer hired a detective who was given employment in the plant for the purpose of "ferreting out the union activities of the men". The respondent maintained that it wanted the information because it did not want "any trouble in the plant" and "wanted to keep a steady flow of business". The undercover agent joined the union and eventually became its treasurer. He filed weekly reports and furnished the employer with lists of union members. A number of these members were subsequently discharged. The Board ruled that the employment of the detective for the purpose of espionage within the union constituted interference, restraint and coercion of employees in the exercise of their rights under the Act.

56. The National Labour Relations Board, with approval from the courts, has inferred from the circumstances that the purpose of hiring an undercover agent to infiltrate the rank and file is to interfere with the exercise of employee rights to self-organization and collective bargaining. In *Re Atlas Underwear Company*, 5 LRRM 398 (1941), the Board found that undercover operatives had been engaged to spy upon employees in their effort to organize. The U.S. Circuit Court of Appeals, Sixth Circuit, in upholding the decision of the Board (*Atlas Underwear Company v. National Labour Relations Board*, 7 LRR Man. 460 (1941) ruled as follows:

The espionage and surveillance finding by the Board is sustained by substantial evidence. The employment of under-cover operatives to spy upon employees in their effort to organize, is in violation of the statute... If mere assertion of a purpose ... to discover theft by employees is to repel an inference that it has other significance, the

provisions of the statute in this respect are incapable of enforcement. There are adequate government agencies for prevention and discovery of criminality.

Given employer hostility to unionization, employment of a private detective agency and the installation of an operative in the guise of a production worker, the billing of union dues by the agency as expense, reports to management immediately destroyed and the presence of the investigator at union meetings, all taken together not only sustain but compel the inference that the primary purpose of the employment of the private agency was espionage over and surveillance of union activities.

57. The U.S. case law appears to be settled that engaging an operative to spy on union activity for the purpose of spying on "lawful union activities" is per se a violation of section 7 of the *National Labour Relations Act*, 29 U.S.C. ss 141-197 (1976). In *Baldwin Locomotive Works*, 6 LRRM 59 (1940) the NLRB found:

without merit employer's contention that there is no showing that employment of detective agency ever had any effect upon labor organizations at employer's plant or any of their members or upon employer's conduct toward any labour organization or their members or that prior to commencement of NLRB proceeding any member of the labour organizations ever suspected or knew about any of the espionage, since "in our view, surveillance of union organization constitutes an interference with the employees' right to self-organization, even though there is no showing that the specific information obtained was used in the commission of an unfair labour practice.

Similarly, in *Bethlehem Steel Corporation*, 4 LRRM 455 (1949), 14 NLRB 539 (1949), the Board held that surveillance of union organizations constitutes an interference with the employees' right to self-organization even though it had not been proved that the information obtained had been used in the commission of an unfair labour practice. In *Virginia Electric and Power Co.*, 11 LRRM 64 (1942) the Board held that "employing an undercover operative to report on employees' organizational movements was an unfair labour practice irrespective of whether he actually submitted reports or whether employees were aware of his activities." Similarly in *Re Montgomery Ward and Co.*, 5 LRRM 302 (1939), 17 NLRB 191 (1939), the Board found that the employer, by engaging undercover agents to secure knowledge of union activities, invaded "the field of union activity which the Act reserves as a matter of right to the employees (and) is in itself an unfair labour practice."

58. The most recent decision of the NLRB on point is the 1964 *Wallace Press Inc.* case, *supra*. The fact that the NLRB has not had to deal with this type of unlawful activity since the early 1960's suggests that its incidence in the U.S. has greatly diminished. We attribute this to the unequivocal findings of the NLRB in this area, which have received strong judicial support, and to the employer reporting provisions of the 1959 *Landrum-Griffin Act* 29 U.S.C. # 401-531 (1976) which were designed to restrict the infiltration of trade unions in the manner discussed. These employer reporting provisions



were premised on the belief that the glare of publicity would discourage surreptitious anti-union activities.

59. Section 203(a)(3) of the *Landrum-Griffin Act* mirrors the language of sections 7 and 8(a)(2) of the *National Labour Relations Act* in requiring employers to disclose to the Secretary of Labour any expenditures made with an object to “interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively ...” The section also requires that employers report payments made to obtain information related to a labour dispute unless the information obtained is to be used “solely in conjunction with an administrative or arbitral proceeding”. Any arrangement made with the object of persuading employees in the exercise of their collective bargaining rights or to provide information for non-litigation purposes must also be reported. A reciprocal requirement is imposed under section 203(b) upon any person who supplies such information or persuades employees. Under the section such persons are required to also report in detail the nature of their arrangement with the employer. Three other important features of the legislation are firstly, the stipulation that the contents of the reports filed pursuant to the Act shall be public information, secondly, the holding of each individual required to sign these reports personally responsible for the filing and for any statement contained therein which he knows to be false and thirdly, the provision for a fine of not more than \$10,000 or imprisonment for not more than one year or both to be imposed against any person who makes false statements or representations, knowingly fails to disclose a material fact or willingly conceals, withholds or destroys any books, records, reports or statements required to be kept under the Act. Although the reported cases reveal that compliance orders, rather than fines and jail terms, have been imposed under the section, it would appear from the lack of reported NLRB cases dealing with employer sponsored infiltration of trade unions subsequent to the passage of the *Landrum-Griffin Act* that the reporting requirements of that Act, coupled with the approach adopted by the NLRB, has been effective in diminishing this type of unlawful activity in the United States.

60. The purpose of these provisions of the *Landrum-Griffin Act* is aptly summarized in the congressional record as follows:

In some instances the matters to be reported are not illegal and may not be improper. But only full disclosure will enable the persons whose rights are affected, the public and the Government to determine whether the arrangements or activities are justifiable, ethical and legal.

(Senate Report, #187, 86th Cong. 1st Sess. 5 (1959) quoted in *Wintz V. Fowler* 63 LRRM 2333 (1964).

61. We now turn to a consideration of the evidence in this case. The evidence supports the following findings of fact:

- (1) We find, and it is not disputed, that Automotive retained the Services of Securicor for the purpose of hiring an undercover investigator employed by Securicor to work as a bargaining unit employee prior to the commencement of the strike on September 28, 1981 and to take part in the strike as a union member and to

report to Automotive prior to and during the course of the strike. David Ivers was the undercover investigator assigned to the case by Securicor. We further find, and it is not disputed, that at all material times Securicor and its employee David Ivers acted on behalf of the employer Automotive.

- (2) Having regard to the content of the reports filed by Mr. Ivers, his behaviour while posing as a striking employee, the failure of either Automotive or Securicor, who had full knowledge, to in any way restrict the activities or the reporting of Mr. Ivers, the unsatisfactory evidence of Mr. Ivers as to why he reported on the range of subjects that he did and his admissions with respect to the instructions he received from time to time, we hereby find that the purpose of Mr. Ivers' assignment was *firstly*, to provide the employer, Automotive, with information from within the union pertaining to:

- union plans and efforts to discover the location of the warehouse from which the company was carrying on business and information with respect to the numbers on the picket line at certain times.
- the extent of support for the strike within the bargaining unit.
- views of rank and file union members and the leadership with respect to bargaining issues and strategy.
- dissension within the bargaining unit.

and *secondly* to allow Mr. Ivers to foment and foster dissent within the union.

- (3) Having regard to all of the evidence before us and to the credibility of the witnesses who testified, we hereby find that Securicor, through its employee David Ivers, while acting on behalf of the employer Automotive,

(a) attempted to compromise the local union president, Mr. Jack Kelly, by suggesting that he sell his company supplied ear muffs to Mr. Ivers and later that he pilfer from the company two cases of coffee cups for use during the strike. We make this finding in the absence of any other plausible explanation for the actions of Mr. Ivers in this regard and in the face of his later suggestion to the company with respect to how the company could "nail" Mr. Kelly;

(b) reported to Automotive on a regular basis on all of the subject matters referred to in subsection 2 of this paragraph;

(c) actively challenged the union leadership and fostered dissent within the union through the statements of Mr. Ivers to members of the bargaining unit, his activities in support of the dissident group within the union, and his comments and challenges to the union executive at meetings and at other times throughout the strike; and

(d) committed a number of acts, including the throwing of tomatoes and eggs at a management employee, the throwing of rocks at other management employees, the placing of nails under the tires of cars attempting to enter the company's premises and the counselling of union members to trespass on company property, which ran counter to the direction of the union leadership to the membership to refrain from such activity.

62. Having regard to the evidence in this matter, the nature of the collective bargaining process established under the Act and the protections extended under section 64 of the Act, we find that Securicor, acting on behalf of Automotive,

- interfered with the administration of the complainant trade union in breach of section 64 of the Act when it attempted to compromise Mr. J. Kelly, the local union president, prior to the strike;

- interfered with the administration of the complainant trade union and with the representation of the employees in the bargaining unit by the complainant trade union, in breach of section 64 of the Act, when it assigned Mr. Ivers to infiltrate the union and report to the employer on the views of the rank and file union members and the leadership with respect to bargaining issues and strategy and on internal dissension within the trade union. The actions of Securicor in this regard constitute not only a flagrant undermining of the arm's length relationship established under the Act between employer and trade union but an attempt on behalf of the employer to circumvent the bargaining agent in order to deal directly with its employees. A trade union, as the representative of all the employees in the bargaining unit, adopts bargaining stances which it considers to be in the best interest of and in line with the bargaining objectives of the membership as a whole and need not reveal to the employer information pertaining to the sentiments of individual members or groups of members or about when and under what circumstances it might be prepared to alter its bargaining position. Any attempt by the employer, or anyone acting on behalf of the employer, to obtain this type of information by going directly to the employees in the bargaining unit, undermines the exclusivity of the union's bargaining rights and, therefore, is in breach of section 64 of the Act. Furthermore, as we have observed, where the attempt is made by a person acting on behalf of the employer but posing as a bargaining unit employee, as in this case, the piercing of the arm's length relationship also constitutes a violation of section 64;



- interfered with the administration of the complainant trade union and with the representation of employees by the complainant trade union, in breach of section 64 of the Act, when it assigned Mr. Ivers to infiltrate the trade union and to report to the employer on union plans and efforts to discover the location of the warehouse from which the company was carrying on business during the strike and the numbers of picketers at certain times. As we have observed, a strike, as the cornerstone to the collective bargaining process established under the Act, is an economic confrontation between two sides with each side entitled to plan its own strategy and to take whatever legal steps it chooses in an attempt to weaken the other side. The evidence in this case is not that Mr. Ivers was reporting on these matters in any attempt to protect company property from vandalism or sabotage but rather, in an attempt to assist the company to succeed in its economic confrontation with the complainant trade union. Indeed, Mr. Ivers contacted Mr. McGladdery by phone on November 28th to advise that there would be no one on the picket line from 3 a.m. to 6 a.m. and suggested that Mr. McGladdery contact Automotive in case it wished to move material in or out of the plant during this period.
- interfered with the administration of the complainant trade union and with the representation of employees by the complainant trade union, in breach of section 64 of the Act, when its employee David Ivers fomented and fostered dissent within the complainant union by many of his comments to striking employees, by publicly challenging the union leadership on numerous occasions and by lending his active support to the group of employees who were opposed to the union leadership;
- interfered with the administration of the complainant trade union in breach of section 64 of the Act when its employee David Ivers committed a number of acts which were contrary to the general direction of the union leadership that striking employees conduct themselves in a peaceful and orderly manner.

63. The evidence with respect to the actions of Mr. Ivers referred to immediately above deserves additional comment. Mr. Ivers was not merely a passive observer of the mood on the picket line, a conduit of information to Automotive, or even the instrument for a certain amount of interference in the union's internal affairs. He was also engaged in activities which we have described as contrary to the general direction of the union leadership that striking employees conduct themselves in an orderly and peaceful manner. In addition, these actions would be illegal apart altogether from the *Labour Relations Act*. Whether these activities were undertaken to "strengthen his cover", to discredit a union official (counselling Kelly to steal from his employer), or to justify Securicor's continued involvement in the strike, really does not matter. The fact remains that an individual ostensibly hired to provide "security", and monitor illegal activity, actually engaged in or counselled the very kind of improper conduct which his presence was supposed to prevent. The Board views this aspect of Mr. Ivers' activities with deep concern, because, in our experience, strike situations are volatile enough without the

introduction of this type of outside influence. It is one thing to report upon disorder on the picket line, it is quite another to be a part of it. The remedies for this aspect of the respondent's activities lie largely in other forums, but to the extent that they contravene the *Labour Relations Act*, they are a matter of serious concern for this Board.

64. We consider the unlawful conduct of Securicor to constitute flagrant and egregious violations of section 64. The respondent has, by its actions, struck at the heart of the collective bargaining process, undermining both the arm's length relationship and the exclusivity of the union's bargaining rights. This unlawful conduct was carried out during a bitter and prolonged strike that worked a great hardship on the employees affected. When reference is had to the many reports of Mr. Ivers dealing with the sentiment of the striking employees, the content of these reports, his attempts to discover the mood of the office employees, his fostering of dissent and the timing of his meeting with Mr. Ranny on February 3, 1982 vis-a-vis the decision taken by Automotive in consultation with counsel to press for a final offer vote and the inevitable hiatus in the negotiations, both before and immediately following the vote, we must conclude that the unlawful activities of Mr. Ivers had a direct bearing on the length of the strike. We will have more to say about this in our discussion of remedy. Furthermore, now that it is known that a trade union has been infiltrated in the manner that the complainant union was in this case, by a company which remains in the business of selling its services to employers throughout this province, the coercive impact of the unlawful conduct in this case extends to employees generally. We will have more to say about this in our discussion of remedy as well.

65. Finally, although not required for the disposition of this case, we have come to the conclusion that the infiltration of a trade union by an employer or anyone acting on behalf of an employer during a strike or lockout or in anticipation of a strike or lockout is, per se, a violation of the Act; that is, it is unlawful regardless of the stated purpose for which the infiltration is undertaken or its effect. The only legitimate reason that an employer could advance for infiltrating a trade union in the face of an imminent collective bargaining confrontation would be the protection of his property. However, if an employer intends to infiltrate a trade union by hiring someone to pose as an employee, he must do so well in advance of a strike or lockout. Once there is a cessation of work, it is no longer possible to respond to what is transpiring on the picket line by means of infiltrating a trade union in the manner described. The employer, therefore, must make his assessment as to whether he should act in this way to protect his property well in advance of any work stoppage. However, even if convinced at this early juncture that his property may be in danger, an employer is free to utilize whatever overt security measures he deems appropriate (including the use of his supervisory staff as is usually the case, or the hiring of an outside security service) and, if the threat is perceived as so serious that overt security may be inadequate, the employer is always free to seek police assistance. The need for an employer to infiltrate a trade union with his own agent, therefore, can hardly be viewed as compelling. However, an employer knows full well that when he takes it upon himself to infiltrate a trade union in anticipation of or during a strike or lockout, the person infiltrating the trade union will inevitably become privy to information, as did Mr. Ivers in this case, which, although unrelated to the protection of the employer's property, is directly related to the furtherance of his collective bargaining objectives. Even if an undercover investigator could distinguish one from the other and restrict himself to property-related matters, which is problematic, the fact remains that

the employer has secured for himself an unfair advantage in his collective bargaining confrontation with the union; an unfair advantage which we would have no hesitation in finding to be in breach of the duty to bargain in good faith under section 15 of the Act. The actual reporting on collective bargaining matters by the employer's agent (which we view as an almost inevitable consequence of this type of employer action), although clearly a breach of section 15 of the Act, is not a precondition to a finding of a section 15 violation. Rather, the infiltration itself, which provides the employer with a source of privileged information which he is not entitled to have and which he is then in a position to draw on at any time, creates the unfair advantage and gives rise to the breach of the duty to bargain in good faith. Furthermore, given the time as of when a decision to infiltrate a trade union during a strike or lockout must be made, the alternatives available and the unlawful bargaining advantage which flows, an irrebuttable presumption arises that an employer who infiltrates a trade union at this time intended the consequences of his actions and, therefore, intended to interfere with the representation of employees by a trade union, contrary to section 64 of the Act. An employer, or anyone acting on behalf of an employer, who infiltrates a trade union during a strike or lockout or in anticipation of a strike or lockout, thrusts himself into the exclusive domain of the trade union and, in so doing, breaches section 15 of the Act and contravenes the prohibitions against any interference in the administration of a trade union or in the representation of employees by a trade union contained in section 64 of the Act.

66. We also adopt the approach of the NLRB, based on the same type of statutory protection (albeit applied in the context of union organizing) that no actual restraint or coercion need be proved, that no actual reporting need be done, or that, if reporting is done, there need be no showing that the information obtained was used in the commission of an unfair labour practice, in order for a breach of the statute to be found. Even if it could be said (which it cannot), therefore, that the infiltration of the trade union by Securicor has had no effect, as has been argued by Securicor, or if it could be found (which it cannot) that the unlawful conduct in this case is solely attributable to the actions of Automotive, as is also argued by Securicor, the infiltration by Securicor, as a person acting on behalf of the employer, is, in and of itself, a violation of section 64 of the Act.

67. The finding that the infiltration of a trade union, during or in anticipation of a strike or lockout, is a violation of the Act regardless of the stated purpose or effect, is in keeping with the underlying statutory objective of allowing employees to exercise their rights under the Act free from employer interference. Given the covert nature of the activity complained of, there is no way for an employee to know if an employer-paid undercover investigator is in place. Where the door for this type of activity during a strike or lockout is left open, therefore, employees will have good reason to fear the worst, with no real means at their disposal to detect the worst. In these circumstances, it can reasonably be said that if employers are permitted to infiltrate trade unions during or in anticipation of a strike or lockout for any reason, employees generally will be inhibited in the exercise of their rights under the Act. Given the tenuous need of an employer to resort to union infiltration during a strike or lockout, this is a result which is clearly alien to the scheme and purpose of the *Labour Relations Act*.

#### Remedy

68. The Board has a broad remedial authority under section 89(4) of the Act to



determine what, if anything, an employer, employers' organization, trade union, council of trade unions, person or employee that has acted contrary to the Act shall do or refrain from doing. The section provides:

Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, persons or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

69. The considerations which underlie the exercise of the Board's discretion under section 89(4) of the Act and the importance of a thoughtful exercise of this discretion in carrying out the statutory policy embodied in the Act are analyzed in *Radio Shack, supra*, (app. for judicial review dismissed, (1980) 30 O.R. (2d) 29 115 O.L.R. (3d) 197, leave to appeal refused March 10, 1980 as follows:

It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop "boiler plate" remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. To be effective, remedies should be equitable, they should

take account of the economics and psychology permeating the situation at issue; and they should attempt to take into account the reasons for the statutory violation. Remedies should also be sensitive to the interests of innocent bystanders. This means then that the Board should try and tailor remedies to each particular case. It is equally true, however, that the Ontario Labour Relations Board cannot police the entire labour relations arena. As important as it is for this Board to safeguard the substantive rights it administers, ultimately, compliance with the Act depends on the vast majority of unions and employers according at least minimal respect to the legislation, the Board and the Board's directives. With its limited resources and the time that must be taken to adjudicate fairly issues of controversy, the Board must rely on the co-operation of employers and trade unions in the day to day administration of the Act. For this reason, the Board cannot get too far ahead of the expectations of the parties it regulates. It must be concerned that its decisions are perceived, in the main, as reasonable and fair to attract as much self-compliance as possible. It has therefore been said that the ideal Board order must be both an instrument of education and of regulation. See generally St. Antoine, *A Touchstone for Labour Board Remedies*, (1968), 14 Wayne L. Rev. 1039; Ross, *Analysis of Administrative Process Under Taft-Hartley*, [1966] Lab. Rel. Yearbook 299. Giving effect to these general considerations three basic principles that underpin section 79 have emerged.

The Board drew three conclusions from the considerations set out above. These are firstly, that a remedy is not a penalty; that is, the authority of the Board is to compensate or to otherwise make whole but not to punish. Secondly, that monetary relief is compensatory and thirdly, that a collective agreement cannot be imposed. This last conclusion has been restricted in the more recent cases to situations where the parties have not resolved all of the outstanding issues between them. Where the parties have resolved all of the outstanding bargaining issues between them the Board, in the exercise of its remedial authority, has ordered that a collective agreement be entered into. (See *Treco Machine & Tool Limited*, [1982] OLRB Rep. Dec. 1954 for a review of these cases.)

70. The compensatory focus of the Board's remedial authority was discussed in *Radio Shack*, *supra* under the heading "A Remedy is not a Penalty", as follows:

94. If deterrence was all that the Board had to keep in mind, it would be a simple matter to set up a system of penalties which would achieve this end. There is little doubt that penalties could be devised which would provide second thoughts to anyone intent on violating *The Labour Relations Act*. But the Legislature did not provide the Board with this role and probably with good reason. See *Little Bos. (Weston) Limited*, [1975] OLRB Rep. Jan. 83, at 91. Section 85 [now section 97] of the Act is a section that sets out penalties for contraventions of the legislation and allocates the role of applying these penalties to the Provincial Court. Additional penalties may exist elsewhere in appropriate situations. See *Criminal Code*, R.S.C.

1970, c. C-34, s. 5, 423(2)(a); *Re Regina v Gralewicz et al* (1979), 45 C.C.C. (2d) 188 (Ont. C. A.) By implication, and by the absence of punitive language elsewhere in the statute, it is reasonable to conclude that the Board should not fashion its remedies under section 79 [now 89] with the primary view of penalizing parties. This is not to deny that effective remedies will likely have a deterrent effect, but the primary purpose of a remedy should not be punishment....

95. In the immediate case this principle has importance. For example, affirmative orders that an employer post notices indicating that he has violated the Act and directives that he publicly commit himself to future compliance with the legislation cannot have as their purpose public humiliation, embarrassment and, thereby, punishment. These remedies may be appropriate as might direct trade union access both to employees on an employer's time and to employee addresses, but only as directives aimed at the removal or rectification (to use the language of the statute) of the consequences of a violation. These types of remedies, and their nature is almost infinite, should have as their purpose the amelioration of the lingering psychic effects of unfair labour practices and the consequent injury to a union's organizational or bargaining strength. The jurisprudence developed by the National Labour Relations Board is replete with other examples and demonstrates the great potential for developing affirmative labour relations remedies under Section 79 [now 89]. See McDowell and Huhn, *NLRB Remedies for Unfair Labour Practices*, Wharton School of Finance, Univ. of Pa. (1976). However, the Board must consider the appropriateness of each remedy in a Canadian context and in the light of our own statutory framework.

Although a Board remedy may have a deterrent effect, (and most often will) and may be perceived as punitive by the party against whom it is directed, it will constitute a proper exercise of the Board's discretion under section 89(4) of the Act so long as it flows from the obligation upon the Board to fully compensate and make whole the person or persons who are injured as a result of an unfair labour practice.

71. Securicor has committed a number of very serious breaches of the Act which have been described in detail. Clearly, a declaration of unlawful activity and a cease and desist order must issue in this matter. Furthermore, as in all cases where unlawful activity is found, the Board must also apply its specialized knowledge to assess the impact of the unlawful activity and determine what additional remedies, if any, are required to "make whole" those who have been adversely affected. The Board described the responsibility which falls to it in this regard, under section 89(4) of the Act, in *The Globe and Mail*, [1982] OLRB Rep. Feb. 189 in the following terms:

This Board attempts to provide remedies to unfair labour practices which, although not punitive, are fair in the sense that they are fully compensatory and, as far as possible, put the successful complainant in the position he would have been in had there been no violation of



the Act. In order to achieve the desired remedial result the Board must be sensitive to the realities of the work place so that a correct assessment of the impact of the unfair labour practice is made. The effect of a miscalculation, in terms of both the fairness and the effectiveness of the remedy, is self-evident. These are difficult determinations which tax the special expertise of the Board to the full.

Notwithstanding the inherent difficulty, the Board does not shy away from making these determinations.

72. When reference is had to the recurring message in Mr. Ivers' reports with respect to the failing resolve of the union membership, the lack of commitment of certain portions of the membership to the position taken by the union on the non-monetary issues, and to the admission of Mr. Reid that Mr. Ivers' reports were considered by Automotive in assessing its bargaining strategy, we must conclude that the decision of Automotive to remain firm in its resistance to any of the major non-monetary demands of the union in its February 1st offer was in large measure the result of the information supplied to it by Securicor. Although it was asserted by the Automotive employees who testified that this information was also received from other sources, these witnesses, although asked, were unable to name these other sources and no instructions were ever given to Mr. Ivers to refrain from reporting as he did. As importantly, when reference is had to the factors which governed the company's bargaining response, as set out above, the face to face meeting between Mr. Ranny and Mr. Ivers immediately prior to the making of the decision to request a final offer vote, the instructions Mr. Ivers was given at that meeting and the content of his reports immediately following it, we must conclude that the decision of Automotive to seek a final offer vote and to carry through with the final offer vote, was also in large measure the result of the information supplied to it by Securicor. We are reinforced in these conclusions when we look at the compromises that were made by Automotive in April to end the strike.

73. The nature of the issues in dispute between the parties and the intransigence exhibited by both sides from the outset satisfies us that the unlawful activities of Securicor had no effect on the pace of bargaining during the period October, November and December, 1981. Indeed, the first "signal" by either side that a compromise was possible did not occur until the union moved off its previously inflexible position on the non-monetary issues in bargaining sessions which took place on January 5, 6 and 14, 1982. Given the time that had already elapsed from the commencement of the strike and the nature of the issues in dispute, we see nothing untoward in the delay of the employer's response until February 1, 1982. However, the content of that response, which was predictably rejected by the union, and the decision to then move for a final offer vote and to carry through with the vote can be directly attributed to the unlawful involvement of Securicor in this labour dispute. These decisions taken together caused an hiatus in bargaining which lasted until March 11, 1982. The time required to set up the vote consumed the period February 4th to February 22nd while the inevitable delay following the vote during which the parties reassessed their bargaining positions and scheduled further bargaining sessions consumed the period up to March 11th. No bargaining took place during this period. The parties recommenced bargaining on March 11th and

continued to bargain until an agreement was reached in mid-April. Clearly, the parties required this time to resolve the issues between them. However, the delay in the negotiations from February 4, 1982 to March 11, 1982 must be attributed to the unlawful activities of Securicor and we so find.

74. The five week prolongation of the strike caused by the unlawful activities of Securicor had the effect of extending the period during which bargaining unit employees were unable to earn their living at Automotive. Clearly, in these circumstances, the employees so affected are entitled to be compensated. The union, in recognition of its withdrawal against Automotive, have requested that only one half of the monies that would otherwise be owing, be assessed against Securicor. It could have been argued that Automotive and Securicor are jointly and severally liable and therefore, Securicor should be made to pay the full amount. However, it could also have been argued that Automotive should be assessed the bulk of the compensation otherwise owing. We find no merit in the submission of Securicor that the complainant has received, as part of the settlement to the labour dispute, whatever compensation is required in this matter. In our view, a reduction by half of the amount of compensation otherwise owing is an equitable and practical approach to determining the amount of compensation owed by Securicor. The effect of the union's withdrawal against Automotive, therefore, is to reduce by half the amount of compensation that would otherwise have been paid by Securicor. Accordingly, we will be directing Securicor to pay to the union, for disbursement to the affected employees, an amount equal to half of what each of the employees would have earned had the strike ended five weeks sooner, less half the amount of strike pay or other income received during the relevant period.

75. The five week prolongation of the strike caused by the unlawful activities of Securicor also had the effect of extending the period during which the union paid strike pay to its striking members. Clearly, the union is entitled to be compensated for its expenditure of strike pay during this period and for whatever other reasonable expenses were incurred by it in carrying on the strike for five weeks longer than it would have, had there been no unlawful interference by Securicor. For the same reasons as set out in the previous paragraph we will be directing Securicor to pay to the union an amount equal to half of what the union paid to the striking employees of Automotive during the last five weeks of the strike and, in addition, half of whatever other reasonable expenses were incurred by the union in carrying on the strike during this period.

76. We have already found that the unlawful activities of the respondent in this case have an ongoing coercive effect on the employees directly affected and, in addition, on employees generally who have knowledge of the conduct of the respondent in this matter and knowledge that Securicor remains in the business of selling its services in labour relations matters to employers throughout this province. Where the issue is one of employee intimidation or coercion the oft cited passage from the *Piggot Motors* case 63 CLLC ¶16,264, describing the responsive nature of the employer/employee relationship, bears repeating. The passage reads:

In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously

peculiarly vulnerable to influences, obvious or devious which may operate to impair or destroy the free exercise of his rights under the Act.

The ongoing coercive impact in this case is as a result of the nature and scope of Securicor's operations, the magnitude of the breach and the insidious nature of the actions giving rise to it. The unlawful activities of the respondent strike at the heart of the system of trade union representation provided under the Act and yet the unlawful conduct, even if successful, does not result in any readily identifiable outward manifestation of possible wrongdoing. As in this case, there may be no termination from employment, layoff or other discriminatory treatment to signal employees that they are under attack by reason of having exercised rights under the Act. When the characteristics of the unlawful conduct in this case are coupled with an understanding of the responsive nature of the employer/employee relationship one must conclude that the effect is to inhibit any employee having knowledge of Securicor's conduct in this matter and knowledge that Securicor remains in the business of selling its services to employers in this province, in the exercise of his rights under the Act.

77. We now turn to a consideration of the appropriate response to the broad coercive impact of Securicor's unlawful conduct. Given the broad coercive effect, the remedial response of the Board must be more far-reaching than in cases where an employer, with a discrete group of affected employees, is found to have violated the Act by virtue of his overt behaviour. In this case, we are dealing with an offender who acts on behalf of employers generally and, as part of his business, provides the services of undercover investigators who are trained in covert activities. The Board, as best it can, must fashion a remedy which allays the fears of employees in this jurisdiction having knowledge of this matter, that Securicor may have, or may in the future infiltrate their ranks and report to their employer on matters relating to whatever statutorily protected activities they may be exercising. As far as possible employees must be assured that Securicor is now fully aware of the rights afforded employees under the Act and that it will not in the future attempt to undermine these rights.

78. In approaching the remedial task before us, we draw upon our experience in cases where an employer found to have violated the Act is directed to post signed notices in the work place advising all of its employees of the Board's finding and assuring all of its employees that it now understands and respects their rights under the Act. The remedial purpose of an employer's signed notice is to make his employees aware of the operation of the rule of law and to assure them in the face of the employer's violation of the Act that they will be allowed to exercise their rights under the Act free from employer interference. The extent of the coercive impact in this case should not cause us to shy away from fashioning a remedy which serves the same purpose as the posting of notices in the employer misconduct cases. Indeed, the covert nature of the wrongdoing and the extent of the coercive impact in this case make it imperative that we do so. We have also taken guidance in the shaping of our remedial response from the apparent effectiveness of the employer/persuader reporting provisions contained in the *Landrum-Griffin Act*. The apparent effectiveness of these provisions in achieving the intended result causes us to conclude that if, in the exercise of our remedial authority, we were to impose a reporting obligation upon Securicor we would go a long way towards allaying the fears of



employees in this jurisdiction that Securicor had, or might in the future, infiltrate their ranks. In order to achieve the necessary remedial purpose we could order some form of province-wide advertising or massive mailings by Securicor and in addition, impose upon Securicor some form of reporting procedure. We have decided that the most practical and effective means of achieving the necessary remedial purpose, and at the same time the least costly to Securicor, is a requirement upon Securicor to give written notice to any affected trade union whenever it is retained to act in connection with a strike or lockout or anticipated strike or lockout in this province, with such written notice to contain a reference to the Board's findings in this case and an acknowledgment of Securicor's awareness of and respect for the rights enjoyed by employees under the Act.

79. Finally, those affected, and indeed the public at large, in assessing our response to the unlawful conduct of Securicor in this matter, should understand that the Ontario Labour Relations Board is but a single agency in a comprehensive web of administrative, regulatory and policing agencies designed to oversee the actions and activities of all persons in our society, with a view to ensuring order protecting freedoms and enforcing the laws that have been enacted by our Legislatures. For example there are strict licensing requirements for Security companys under the *Private Investigators and Security Guard Act*, R.S.O. 1980, c. 390. Furthermore the *Criminal Code* makes it an offence to conspire to effect an unlawful purpose. (*Regina v. K-Mart Canada Limited*, 82 CLLC ¶14,185, the court, on appeal, increased the fine against the employer in that case from \$25,000 to \$100,000 for conspiring to breach section 64 of the *Labour Relations Act*). Given the limits on our jurisdiction our response, as it should, flows from our authority under the *Labour Relations Act*.

### Order

80. Having regard to all of the foregoing the Board hereby:
- (a) declares that the respondent Securicor has violated section 64 of the Act;
  - (b) directs the respondent Securicor to cease and desist from infiltrating trade unions on behalf of employers during or in anticipation of any strike or lockout.
  - (c) directs the respondent Securicor to compensate the complainant trade union, for disbursement to the affected employees, an amount equal to half of the monies that would have been earned by these employees had the strike not been prolonged by the unlawful actions of the respondent for a period of five weeks, less half of what was paid to these employees in strike pay or earned elsewhere during this period plus interest;
  - (d) directs the respondent Securicor to compensate the complainant trade union in an amount equal to half of the monies paid in the form of strike pay to its striking members during the five week period that the strike was prolonged as a result of the unlawful

activities of the respondent plus interest and, in addition, to compensate the complainant trade union for one half of whatever other reasonable expenses were incurred by it in carrying on the strike for five weeks longer than it would have, had it not been for the unlawful activities of the respondent, plus interest;

- (e) directs the respondent Securicor to compensate the complainant trade union in an amount equal to half of the strike pay paid by the complainant union to David Ivers during the course of the strike plus interest;
- (f) directs the respondent Securicor or any related company within the meaning of section 1(4) of the *Labour Relations Act*, for a period of two years from the date hereof, to give written notice to any trade union which represents the employees of the employer retaining it in relation to any strike or lockout or anticipated strike or lockout in the form prescribed by Appendix "A" hereto. Such notices are to be sent by Securicor or any related company within the meaning of section 1(4) of the Act, to the affected union(s) by registered mail within 24 hours of having been retained in relation to any strike or lockout or anticipated strike or lockout and are to be signed by a responsible official of Securicor or of a related company.

We will remain seized of this matter in the event the parties experience any difficulty with the implementation of our remedial order.

#### **PARTIAL DISSENT OF BOARD MEMBER F.W. MURRAY;**

1. I wish to dissociate myself from the obiter comments of the majority at paragraph 65 of the decision wherein they reason that it is a violation of the act to infiltrate a trade union, regardless of stated purpose or effect in anticipation of or during a strike or lockout. The paragraph does not make reference to the infiltration of a trade union at times other than strike or lockout. Just as there may be good and sufficient reason to infiltrate the bargaining unit to deal with theft, sabotage or other attacks on an employer's property at times other than during a strike or lockout, so also there may be good and sufficient reason to infiltrate the bargaining unit at the time of a strike or lockout. Where there is good and sufficient reason and there is no attempt to secure an unfair collective bargaining advantage, the infiltration of the bargaining unit can hardly be found to be in breach of the *Labour Relations Act*. These are cases which should be decided on their individual facts and not by the application of a "per se" doctrine and accordingly, I disassociate myself from paragraph 65 of the decision in this matter.

2. I would add, however, that the manner in which the majority have used the bargaining duty in section 15 of the Act to construct the "per se" violation cuts both ways. Just as the majority find that employer conduct away from the bargaining table can give rise to a breach of the duty to bargaining in good faith, so also trade union conduct away from the bargaining table can be scrutinized under the same obligation.

APPENDIX "A"

## THE LABOUR RELATIONS ACT

NOTICE TO TRADE UNION

## ISSUED BY ORDER OF THE ONTARIO LABOUR RELATIONS BOARD

1. We hereby advise you that we have been retained to act in connection with a labour dispute between yourself and (Name of Employer).

2. This notice is given to you in compliance with an order of the Ontario Labour Relations Board issued after a hearing in which we participated fully. The Ontario Labour Relations Board found that we violated the *Labour Relations Act* when we infiltrated a trade union that was involved in a labour dispute, by means of having an undercover agent in our employ hired on as a bargaining unit employee and then having that investigator pose as a striking member of the bargaining unit during a strike. The Board found that our undercover investigator fostered and fomented dissent within the union and reported to the employer on matters relating to the collective bargaining issues in dispute.

3. We recognize that the Act gives employees the right to organize themselves, to form, join and participate in the lawful activities of a trade union and to act together for collective bargaining. We now respect these rights and assure you that we will not do anything that interferes with the lawful exercise of these rights.

Dated at this day of , 198 .

\_\_\_\_\_  
 Securicor Investigation  
 and Security Ltd., (or related  
 Co. within the meaning of  
 section 1(4) of the Act)  
 per (Responsible Official)

\_\_\_\_\_



**2435-82-R** Amalgamated Clothing and Textile Workers Union, Toronto Joint Board, Applicant, v. 529592 Ontario Limited Carrying on Business as **Shiffer-Hillman Clothes**, Respondent.

Sale of a Business – Vice-President and General Manager purchasing assets, fixtures and inventory of company from receivers – Retaining vendor's name and hiring six employees – Vendor's business to manufacture clothing and sell wholesale – New restructured business contracting out manufacturing aspect and selling directly to public – Board finding sale of part of business

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members C. G. Bourne and S. Cooke.

**APPEARANCES:** *James K. Hayes, Giannino Mitrano and Jack Matria for the applicant; R. Michael Power for the respondent.*

#### **DECISION OF THE BOARD;** May 31, 1983

1. The applicant has applied under section 63 of the *Labour Relations Act* with respect to the bargaining rights of the applicant as a result of an alleged sale of a business by Shiffer-Hillman Company Limited to 529592 Ontario Limited in January of 1983. In the alternative, the applicant sought relief under section 1(4) of the Act.

• • •

3. In its reply, the respondent opposed the claims for relief and adopted the position that it is not a successor employer. It was the position of the respondent that it purchased the assets of Shiffer-Hillman Company Limited ("Shiffer") from the receiver, Peat-Marwick Limited, and no longer carries on the same business. It was also the position of the respondent that it no longer manufactures clothing and that it sells to the public which Shiffer did not do.

4. The premises of Shiffer were formerly located on three and a half floors at 197 Spadina Avenue in the City of Toronto. In 1981, Shiffer owed approximately two million dollars to the Canadian Imperial Bank of Commerce (the "bank"). Mrs. Rachel Hillman, who received her shares from her deceased husband, is the principal shareholder in Shiffer and owns about three quarters of the issued shares. Almost all of the remaining shares are held by Rachel Hillman's daughter, Mrs. Ruth Waldman, with a law firm in Toronto owning a few nominal shares.

5. In 1981 the bank requested additional security to cover the debt of two million dollars. The shareholders of Shiffer declined to provide the added collateral for the debt and the bank appointed Peat-Marwick Limited as receiver in May of 1981. At that time Shiffer also owed about four hundred thousand dollars to trade creditors and buyers. The receiver collected the accounts receivable, continued to operate Shiffer and manufacture all the raw inventory and sold off some four thousand suits which formed the greater part of the finished inventory. Until Shiffer was placed in receivership, Samuel Waldman was its general manager and vice-president. His employment with Shiffer was terminated on December 4, 1982.

6. The receiver auctioned off most of Shiffer's equipment and machinery and the proceeds amounted to between one hundred and twenty-five and one hundred and fifty-five thousand dollars. There were no bids for the items which were not sold. The unsold items consisted of a few clothing racks, sewing machines, old pressing machines and sewing tables. Mr. Waldman attended the auction but did not bid on any of the items.

7. After the auction, the receiver still held about one hundred and fifty suits, one hundred ladies' skirts, clothing racks, two or three sewing machines, patterns, a trade name, some office desks, two typewriters, adding machines and three motor vehicles (a 1975 Cadillac, a 1977 Station Wagon and a 1978 Buick). These items had not been offered at the auction because the receiver was engaged in conducting a public sale and required most of the items referred to in this paragraph in order to conduct the sale. The receiver obtained a valuation of these items and asked Mr. Waldman to put in an offer if he wished to do so. Mr. Waldman did make an offer to the receiver. His offer was better than an offer by Danbury Sales and was accepted.

8. Mr. Waldman arranged the incorporation of 529592 Ontario Limited for the purpose of making this offer. The offer and acceptance by the receiver were in the following form:

Peat Marwick Limited  
Trustees in Bankruptcy  
Commerce Court West  
P.O. Box 31  
Commerce Court Postal Station  
Toronto, Ontario  
M5L 1B2

December 10th, 1982

Attention: Mr. Joe Tucker

Dear Sir:

Re: Shiffer-Hillman Company Limited

529592 Ontario Limited is prepared to purchase the assets, fixtures, and inventory of Shiffer-Hillman Company Limited as follows:

1. Inventory

(a) <u>123</u>	Mens Suits @	<u>\$15.00</u>	\$1,845.00
(b) <u>17</u>	Ladies Suits @	<u>\$15.00</u>	255.00
(c) <u>61</u>	Mens and Ladies Jackets @	<u>\$10.00</u>	610.00
(d) <u>196</u>	Mens and Ladies Skirts and Slacks @	<u>\$ 5.00</u>	980.00
(e) <u>23</u>	" " " Specials	<u>\$10.00</u>	230.00
		<u>Total</u>	<u>\$3,920.00</u>

2. All Fixtures and equipment, patterns, name "Shiffer-Hillman", and any other assets re sale and manufactured by Shiffer-Hillman Company Limited for the total sum of \$2,000.00

3. Vehicles

(a) 1978 Buick four-door sedan	\$1,500.00
(b) 1978 Oldsmobile stationwagon	\$ 600.00
(c) 1975 Cadillac	\$ 25.00

\$1,000.00 is being held by you as a deposit and balance is to be paid on closing and final inventory.

529592 ONTARIO LIMITED

Per: "Samuel Waldman"  
Samuel Waldman - President

All assets described above are sold "As Is; where is", without any Warranty either express, implied or given.

Per: Peat Marwick Ltd.

(Signature illegible)

December 17/82

Witnessed by: "James Price"  
JAMES PRICE

9. It was the intention of Mr. Waldman through 529592 Ontario Limited to start a new business of selling directly to the public. The items referred to in the letter dated December 10, 1982, were not sufficient to begin a business. For example, most of the suits were size thirty-six and additional inventory was purchased from other manufacturers in the Toronto area. The respondent commenced business on December 21 or 22, 1982, and has since negotiated and executed a lease for half of a floor of the three and a half floors formerly occupied by Shiffer.

10. At the time of the hearing in March of 1983, the respondent employed six persons -three in sales, two on alterations, and one cutter. Four of these persons are employed full-time with the cutter and one of the persons employed on alterations working part-time. The respondent does not sell to retailers and the three sales staff sell only to the public with minor alterations to clothing. The respondent does not manufacture on its premises. The respondent buys from manufacturers and also obtains suits from separate small companies which manufacture suits to the specifications and patterns which the respondent purchased from Shiffer. In contrast, Shiffer did not purchase clothing from the manufacturers which supply the respondent. Of the respondent's present staff - a tailor, a seamstress, a cutter and three sales staff - all previously worked for Shiffer. The tailor, seamstress and cutter were, and are, members of the applicant. The forty-nine former employees of Shiffer were given the required



notice under the *Employment Standards Act*. At the time of the auction there were two employees working in the tailoring shop.

There is no equipment or machinery on the premises other than the items acquired from the receiver.

11. By December 10, 1982, the cutter and the seamstress were terminated by the receiver. However, the tailor was kept on until after December 10 to finish what had been sold the public. Later in December, however, even the tailor was terminated by the receiver. A salesman and another employee were retained by the receiver after December 10 to finish off alterations and sell to the public. On December 12 or 13, 1982, the receiver closed the premises to complete inventory. The respondent is now using the Shiffer-Hillman name as a clothing label. The clothes are produced at small shops according to the Shiffer-Hillman patterns now owned by the respondent and the label is attached. At the present time the name Shiffer-Hillman appears on the respondent's stationery and also appears on the premises. The two small companies which manufacture and provide the clothing to the respondent are in essence contracting companies. The respondent uses the same telephone number as was formerly used by Shiffer.

12. Shiffer was bound by a collective agreement between the applicant and the Men's Clothing Manufacturers Association of Ontario effective from December 1, 1980, until November 30, 1983. The receiver abided by the terms of this collective agreement during the period of its receivership. The respondent commenced its operations on or about December 21 or 22, 1982, and one of its present employees came a few days later before Christmas of that year. Other employees commenced their employment with the respondent at the end of December or the beginning of January, 1983. The respondent entered into the understanding about the lease in December of 1982. The respondent concedes that it is an advantage to stay in the same location because the receiver had engaged in an expensive advertising campaign in the *Globe & Mail*. The respondent has continued this with a series of advertisements in December, January and February, which proclaim the "Miracle on Spadina Avenue", "Canada's Finest Suitmaster Continues To Sell Direct From The Factory!" and "Thanks to the miracle on Spadina Avenue the NEW Shiffer Hillman is alive and well and is still offering the finest clothing from their factory showroom. We thank our customers who have supported us during the past year and have made this miracle a reality". The name "Shiffer Hillman" is featured prominently in each advertisement and so is the address and telephone number of the respondent. The respondent concedes that the name Shiffer-Hillman was very important in its business. In addition to advertising in the *Globe & Mail*, the respondent also advertises in *Key Magazine*, which is placed in hotel rooms in Metropolitan Toronto.

13. The suits which carry the Shiffer-Hillman label are made for the respondent by two companies, one known as Fine Arts and the other known as Joe Celeste Tailors. These companies have been in business for a number of years. Mr. Waldman agreed that these two companies are in essence contracting companies. Some of the men employed by Fine Arts, such as the designer, the foreman and some operatives formerly worked for Shiffer and a man who formerly worked for Shiffer as a foreman now works for Joe Celeste Tailors. One of the foremen with Shiffer in the pant department has now set up his own manufacturing shop and has commenced selling to the respondent. Mr. Waldman

is the only person in management employed by the respondent. No one else, of course, uses the Shiffer-Hillman label. Mr. Waldman and Ruth Hillman were married in 1963. However, Mr. and Mrs. Waldman separated after the receiver was appointed but before December, 1982. There was no suggestion before the Board that the relationship, past or present, between Mr. and Mrs. Waldman had any bearing on this application.

14. As the Board observed in *Marvel Jewellery Limited and Danbury Sales (1971) Ltd.*, [1975] OLRB Rep. Sept. 733, section 63 recongizes that collective bargaining rights should have some permanence and that rights created either by the Act or under a collective agreement are not allowed to evaporate with a change of employer. In the instant application, the respondent presently employs six employees (including three employees in the bargaining unit represented by the applicant in collective bargaining with Shiffer) who were formerly employed by Shiffer. However, the employment of former employees is merely one factor which may accompany the sale of a business.

15. The Board, in determining whether a sale of a business has occurred, has examined the totality of the transaction and has not had regard merely to the outward form of the transaction. In *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691, the Board at page 698 listed some considerations in determining whether a sale of a business had occurred and stated:

En route to a determination of the above essential questions the cases offer a countless variety of factors which might assist the Board in its analysis: among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e. whether there has been a continuation of the business.

16. The key person in the transaction before the Board is Mr. Waldman. He was formerly the vice-president and general manager of Shiffer. He arranged the incorporation of 529592 Ontario Limited for the purpose of this transaction. Mr. Waldman operates out of the same location as Shiffer with the same telephone number and with the same

name of Shiffer appearing on the outside of the premises and on the stationery. Moreover, 529592 Ontario Limited carries on business as Shiffer-Hillman Clothes. The respondent has the right to use and uses the patterns acquired from Shiffer. The work of producing clothing in accordance with these patterns has been sent out to shops with the finished product being sold by the respondent with a label bearing the name Shiffer-Hillman being affixed to the garment. In considering the factors set forth in *Culverhouse Foods Limited, supra*, there has been *de facto* transfer of goodwill with the purchase and transfer of the name Shiffer-Hillman. While there was no evidence of the existence of customer lists, much less a transfer of such lists, the respondent is endeavouring to serve the same type of market. There was a partial sale of inventory and while there was no actual covenant not to compete this was not necessary because Shiffer has gone out of business. As mentioned earlier, Mr. Waldman and six former employees of Shiffer are now working for the respondent and are using the skills formerly exercised in the service of Shiffer. There was virtually no hiatus in production. The major factor which has played no part in the transaction is the disposition of the accounts receivable. In the circumstances of this application, however, the accounts receivable were taken over by the major creditor, the bank, and were not available to transfer to anyone.

17. In deciding whether a transaction is a sale of assets or a sale of a part of a business, the Board pointed out the difficulties in *The Tatham Company Limited*, [1980] OLRB Rep. March 367 at pages 376-7:

All of the cases to which we have referred recognize that there are no easily administered mechanical tests which permit the Board to readily distinguish between a "mere sale of assets" and a sale of "part of a business". As the Board commented in *Metropolitan Parking, Inc.*, [1979] OLRB Rep. Dec. 1194 at paragraph 34:

"This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a 'business' or 'a part of a business' and the transfer of 'incidental' assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided."

The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a "sale of a business" finding in one sector of the



economy may be insufficient in another. In some industries, particular configuration of assets – physical plant machinery and equipment – may be of paramount importance; while in others it may be patents, “know-how”, technology expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. *The Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 55 [now section 63] must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.

18. In the instant application in viewing the substance of the transaction in the context of the clothing industry, the Board views the activities of the respondent as carrying on a restructured business based upon the necessary parts of the business of Shiffer in order to attain these ends. The most important components of the respondent's business were the location and the name of Shiffer-Hillman. The respondent's heavy reliance on these components is readily identified by the advertising campaign in the *Globe & Mail* and in a magazine. Without the name of Shiffer-Hillman the respondent would be just another wholesaler of clothing with a sales outlet to the public. The Board finds that the respondent is operating a scaled down business consisting of a part of the business formerly operated by Shiffer. The fact that the respondent has varied the manner of merchandising and in reaching the ultimate purchasers of Shiffer-Hillman clothing by contracting out the manufacturing and selling directly to the public rather than on a wholesale basis does not change the fact that the respondent now operates a part of the business formerly operated by Shiffer.

19. Having regard to the foregoing, the Board finds that there was a sale of a part of a business within the meaning of section 63(1) of the Act and declares that the respondent continues to be bound by the collective agreement between the Man's Clothing Manufacturers Association of Ontario and the Toronto Joint Council Board Amalgamated Clothing and Textile Workers Union made on December 1, 1980, with respect to the employees in the bargaining unit contained in that collective agreement.

20. The parties did not pursue the request for relief under section 1(4) and in the circumstances of this application, this matter is dismissed in so far as it relates to section 1(4).

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**2236-82-U** Melvin Runchey, member of Local 1005 USWA, Complainant, v. Cec Taylor, President, Local 1005 USWA Len Taylor, Gri vance Chairman, Local 1005 USWA, Respondent, v. **Stelco Inc.**, Intervener.

**Duty of Fair Representation - Unfair Labour Practice - Complainant's discharge grievance settled during arbitration hearing - Settlement on legal advice - Twenty-three grievances consolidated in one hearing - No violation**

**BEFORE:** George W. Adams, Q.C., Chairman.

***APPEARANCES:** Mel Runchey and Rolf Gerstenberger for the complainant; Alick Ryder and Cecil Taylor for the respondent; and T. F. Storie and R. Lane for the intervener.*

**DECISION OF THE BOARD;** May 11, 1983

1. This complaint is amended to delete the respondents Cec Taylor and Len Taylor in their personal capacities.
2. This is a complaint under the duty of fair representation section of the *Labour Relations Act* alleging that the respondent breached section 68 of the Act by acting in a manner that was "arbitrary, discriminatory or in bad faith" in the handling and settlement of the complainant's grievance. The respondent's reply outlines the background to the complaint and the respondent's position with respect to it. It reads:

#### **SCHEDULE "A"**

1. Mr. Runchey is one of 23 grievors contesting discipline imposed by Stelco for conduct occurring during a strike by the members of Local 1005 which commenced in August, 1981.
2. The grievances were submitted to arbitration before J. D. O'Shea, appointed as a single arbitrator under s. 45 of the Labour Relations Act.
3. The Respondent retained James Hayes and Elizabeth Lennon of Messrs. Golden, Levinson to represent the grievors. Each of the grievors, including Mr. Runchey, was interviewed, and the normal steps taken in preparation for the hearings.
4. The grievances were consolidated and the employer was obliged to adduce its evidence with respect to each of the grievors before the Respondent Union was called upon to adduce its evidence in defence.
5. Some ten days of hearings occurred during which most of the employer's evidence against Mr. Runchey and the other 22 grievors was heard. Each grievor, including Mr. Runchey, was advised by letter of the place and date on which any evidence against him was to be given.

6. The hearing days occurred between March and June of 1982. During this time it became apparent that a resolution by settlement was preferable to that obtainable, in all likelihood, from an arbitrated decision. Discussions resulted in the attached settlement. In arriving at the settlement, the merits of each individual grievor's case was specifically addressed. It is the Respondent's submission that an arbitrated decision would not have improved the result for Mr. Runchey or for any of the other 22 grievors.

7. The settlement was recommended to the Union by its solicitors, approved by it and implemented."

3. The respondent and intervener were engaged in a very lengthy strike lasting some 125 days. During that strike, picketing activity became particularly intense and obstructive, necessitating the intervention of the Supreme Court of Ontario by way of injunction. In response to what the company perceived as gross misconduct and towards the conclusion of the strike, the company slated a number of employees for discharge and still more for varying degrees of discipline. This proposed action became itself an issue in the strike. Mr. Cec Taylor testified that the strike was ultimately settled on the understanding that there would be no discharges and that any discipline imposed would be no more severe than 30 day suspensions and that the parties would expedite grievances filed in relation to such disciplinary action. Subsequently, some 26 employees were disciplined under this understanding and 23 grievances were filed with the Ministry of Labour pursuant to the expedited arbitration procedure provided by section 45 of the *Labour Relations Act*. Presumably to facilitate the litigation of these matters and in recognition of their apparent common factual foundation, the Minister of Labour appointed a single arbitrator, Mr. J. D. O'Shea, Q.C., to arbitrate all 23 matters.

4. Having regard to the way in which Mr. O'Shea's appointment was made and having regard to the nature of the grievances, the parties agreed to proceed with the 23 grievances concurrently and the company would, therefore, present all of its evidence with respect to the 23 grievors first. In effect the grievances were consolidated. This approach was designed to expedite the arbitrations and avoid the need for both parties to call witnesses pertinent to all grievances on a repetitive basis. It was understood that the company would advise the trade union which grievors would be affected by the evidence to be called on any particular day and these grievors would be advised of their right to attend and arrangements would be made by the parties for their attendance. The grievors were also free to attend all days of hearing although specific arrangements for their attendance were only made for those days on which evidence was to be adduced that directly affected them. Early on in the hearings, Mr. O'Shea ruled that even where a grievor had not been contacted, evidence could be led with respect to that person and the witness could be recalled if the absence of the affected grievor impeded cross-examination.

5. Instead of handling the case through its lay counsel, the respondent decided that the matter was sufficiently complex and important to justify the retention of legal counsel. Accordingly, J. K. A. Hayes and E. J. Shilton Lennon were retained to handle the matter. They were assisted by a law student. The evidence establishes that counsel met with all grievors prior to the commencement of the case and investigated the grievances thoroughly. Mr. Hayes was primary counsel and conducted the hearings of



April 19th, May 10th, May 31st, June 1st and June 8th. Mr. Hayes and Mr. Storie who acted for the intervener co-operated in a manner designed to facilitate the effective handling of the 23 grievances. The intervener's counsel provided Mr. Hayes with extensive particulars at the outset of the matter and as the hearings proceeded, further particulars of each day's evidence was also made available.

6. August 13th, 1982 was the next day for hearing scheduled after the hearing day of June 8th, 1982. Prior to that date Mr. O'Shea rendered an interim award dismissing a motion by the respondent aimed at limiting the company's evidence to certain representations made by foremen to the grievors at the time of the issuance of the discipline. This ruling was a strategic blow to the approach to be taken on behalf of the 23 grievors. Against the issuance of this interim award and having regard to the very detailed and substantial presentation of the intervener over the hearings up until that point in time, Mr. Hayes and Mr. Storie began to consider the possibilities of a settlement. To this end, Mr. Storie made available to Mr. Hayes all of the additional evidence and particulars upon which it was going to rely and Mr. Hayes verified this information with the affected grievors and the officials of the respondent.

7. In the meantime, the hearing of August 13th proceeded as scheduled but, because of Mr. Hayes' unavailability, Ms. Shilton Lennon represented the grievors and the respondent. Due to a bona fide error by the intervener, the respondent was not advised that evidence would be led on August 13th that pertained to the grievor, Mr. Runchey. When this evidence was lead, Ms. Shilton Lennon decided against asking for an adjournment to facilitate Mr. Runchey's attendance at the hearing. She testified that by this point in the proceedings, there were few surprises; other grievors were in attendance who were with Mr. Runchey at the times to which the evidence related; she had a firm understanding of the grievor's position from having been present at various discussions between he and Mr. Hayes at earlier hearings; and, finally, if a problem did arise, she was confident that the witness in question could be recalled. The law student assisting her on the day in question copied down a verbatim transcript of the evidence relating to Mr. Runchey and forwarded it to him for his comments by letter dated August 19th, 1982. Mr. Runchey received this letter and the attached transcript and failed to reply or dispute its contents at any time thereafter.

8. It is not irrelevant to note that the respondent was shouldering a cost of some of \$5,000 per hearing day and that both parties to the arbitration were sensitive about the amount of time that had been expended and that would be required in the future in order to pursue the 23 grievances to their conclusion at arbitration. The intervener estimated that three or four more days following August 13th would be required to complete its case and the respondent anticipated that it would need to call some 46 witnesses at a minimum. Mr. Hayes testified that by the end of the summer, he had a full appreciation of his own case and witnesses and the case of his opponent. He was further satisfied after discussions with Mr. Storie that he could achieve a result by way of settlement that would be more advantageous to all grievors than would an arbitration award. To this end, therefore, he negotiated the outline of a tentative settlement with Mr. Storie which reduced the discipline imposed for a number of employees and, for the grievor, a commitment by the company to rely upon the five-day suspension only in the context of any future alleged misconduct arising out of "participation in any future work stoppage whether legal or illegal...". Mr. Hayes testified that he was totally familiar with Mr.

Runchey's position in that Mr. Runchey pursued this position with him relentlessly. He was satisfied, as was Ms. Shilton Lennon, that there was ample evidence on the record of Mr. Runchey's obstructive conduct on the picket line and he was further satisfied that if Mr. Runchey took the witness stand he would undoubtedly prejudice his own case. It was against this background that Mr. Hayes, by letter dated August 26, 1982, wrote a six-page opinion letter to Mr. Cec Taylor, President of the respondent, recommending the proposed settlement of all 23 grievances. The opinion letter sets out in detail Mr. Hayes' thinking about the grievances and their prospects for any better outcome through litigation.

9. It is a practice of the respondent to settle cases in the arbitration process without seeking the concurrence of the grievance committee or of the union membership. It is also the practice of the respondent not to accept appeals by affected grievors when such settlements are made against their wishes. The propriety of not allowing appeals was discussed and approved by the Board in *Stelco Inc.; Re Joseph R. Strong and USWA, Local 1005*, [1983] OLRB Rep. Mar. 453. Nevertheless, before approving the settlement recommended to him by Mr. Hayes, Mr. Taylor placed the recommendation before the grievance committee or at least before a number of members of the committee and before all of the grievors save for one who could not attend. The evidence reveals that those on the grievance committee who attended the meeting in question approved of the settlement and Mr. Taylor testified that the objections to the settlement by some of the grievors did not persuade him against accepting the proposed settlement. Accordingly, the settlement document was executed by the parties. Subsequently, Mr. Runchey tried to appeal the disposition of his grievance but this request was refused. He then filed the instant complaint with the Board.

10. In my view, there is absolutely nothing in this recitation of events that violates the duties and responsibilities imposed on a bargaining agent by virtue of section 68 of the *Labour Relations Act*. The consolidation of the grievances having regard to the circumstances and to the procedural arrangements arrived at by the parties cannot be characterized as arbitrary or discriminatory or having been adopted in bad faith. Indeed, the willingness and ability of the parties to proceed as they did can only be commended. The respondent and intervener had just been through a difficult strike. Workplace morale and a concern for the grievors dictated the approach adopted. The way in which the hearings were conducted appears to me to be entirely reasonable and the actions of the lawyers involved were clearly beyond reproach. By the time the matter was settled I was satisfied that Mr. Hayes and Mr. Taylor had a complete grasp of the evidence and the details of each grievor's case. This is not a case that was settled simply because of cost and without regard to the evidence established or likely to be established before a board of arbitration. There is also no evidence that Mr. Runchey's grievance was traded off against a better result for some other grievor. The matters at stake involved a very central labour law issue of vital importance to this trade union, i.e. the ambit of proper picketing. Mr. Runchey's grievance was settled in light of the applicable principles and his conduct. The settlement of all of these grievances, viewed against the evidence placed before me, does not violate the *Labour Relations Act* and, indeed, clearly appears to have been sensible and responsible.

11. For all of these reasons the complaint is hereby dismissed.

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**0139-83-U Catherine Syme, Complainant, v. Graphic Arts International Union, Local No. 28-B, Respondent.**

**Duty of Fair Representation - Unfair Labour Practice - Union not proceeding to arbitration with grievance - Permitting union membership to decide course of grievance no violation - Decision taken on basis of merit and legal advice - No breach of union's duty**

**BEFORE:** R. O. MacDowell, Vice-Chairman.

**APPEARANCES:** *Catherine Syme for the applicant; Douglas J. Wray and Ken Magnus for the respondent.*

**DECISION OF THE BOARD;** May 27, 1983

# I

1. This is a complaint filed under section 89 of the *Labour Relations Act*, alleging that the respondent trade union has contravened section 68 of the Act. That section reads as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The complainant contends that the respondent union acted improperly and in breach of its section 68 obligation when it decided to settle her grievance rather than proceed with it to arbitration.

• • •

3. The complainant has been working for Photo Engravers & Electrotypers Limited for some years. She works in the binding department on a "casual" "call-in" basis - that is, she works intermittently, depending upon the company's fluctuating work requirements. For example, where the company is called upon to bind a Simpson's catalogue or other big job, the complainant is called in to work. When the work is completed the grievor is laid off until such time as business picks up again.

4. The employer is bound by a collective agreement with the respondent union which consists of two parts. One part is a so-called "master agreement" which sets certain terms and conditions of employment which also apply to other employers in the industry. The other part is a codicil or "local agreement" which applies solely to the operations of Photo Engravers & Electrotypers Limited. The complainant's terms and conditions of employment are prescribed in these two documents.

5. The complainant's employer has established a fairly elaborate seniority system. The master agreement provides that seniority shall be determined on the basis of years of service in a particular job classification, but for some years there was a dispute about how



to calculate the seniority for the many casual employees called in to work on an intermittent basis. In 1978, this ongoing problem was resolved by establishing three separate seniority lists corresponding to the employees' apparent "stake" in the employment relationship based upon their length of continuous employment in an agreed base period. It is unnecessary to review the basis for those three lists here. It suffices to say that the employees on List 1 can be described as regular full-time employees of the company, the employees on List 2 have a more tenuous claim to employment and its benefits, and the employees on List 3 have the least claim. When a vacancy arises for a job that would fall within the List 1 category, the employer must canvass those employees who might be interested on List 2, then, if necessary, turn to those employees on List 3. The complainant is at the top (i.e., the senior employee) on List 3.

6. The complainant's problem arose in or about September, 1981, when the employer decided to hire a regular full-time *apprentice* binder who, in the ordinary course, would be part of List 1. The apprentice binder (Jane Pigeon) was hired as an "apprentice journeyman 2". This is a lower classification with a wage rate lower than the complainant's, but as a regular employee Ms. Pigeon could expect to work on a more regular basis than the complainant. The agreement provides that the company can hire a quota of apprentices fixed in proportion to the number of journeymen. There is no allegation that the hiring of Ms. Pigeon exceeded that quota. Once hired, the apprentices receive training and eventually progress to higher classifications. The complainant served her apprenticeship some years ago.

7. The complainant was annoyed. Ms. Pigeon was a younger woman, working on a more permanent basis (albeit at a lower wage rate and in a lower classification), and the complainant believed that permanent positions should be offered to experienced journeymen on List 2 or, like herself, on List 3. She did not want an apprentice's position however. In her opinion, the company should not have sought an apprentice at all, but should have created a vacancy for a journeyman II. Some seventeen individuals on seniority List 2 would have been qualified for that job. In her evidence before the Board, she reiterated that she was not interested in applying for an apprentice position, for which the company advertised a vacancy. She wanted a "regular full-time" position as a journeyman II - her own classification.

8. In other words, the thrust of her complaint was that the company should not have advertised a vacancy for an apprentice position, but rather for a higher paid position in which she might have been interested had the same seventeen people ahead of her in seniority not sought to take it. It is obvious, therefore, that even if she had been successful in finding some contractual basis to require the company to post a job vacancy for a journeyman II binder rather than an apprentice, there would be at least seventeen employees on the List 2 seniority list who would have a prior claim to the job opening before the complainant could be considered. Her chances of actually being employed on a regular basis were very remote indeed. Moreover, there was a serious question whether there was any basis at all for the complainant's grievance. It appeared on the surface that the company was acting in accordance with the terms of the collective agreement.

9. The respondent union and its officials were not unsympathetic to the complainant's claim to full-time employment. But they did not immediately see how the company's hiring of an apprentice constituted a breach of the collective agreement since

apprentices were contemplated in the agreement itself and the complainant did not want to work as an apprentice – the only job opening then available. It is one of the ironies of this case that had the complainant been told from the start that she had no grievance and that the union members' money should not be wasted pursuing a baseless claim, the union would have later had a stronger position in this forum.

10. But that is not what the union did. Rather than telling the complainant, at the start, that her claim could not be supported on the terms of the collective agreement, the union officials helped her to draft a grievance alleging that the hiring of an apprentice was contrary to the terms of the collective agreement. It was asserted that, instead, the company should have hired one of the many journeymen on List 2, and, if such employees were not interested in the job, hired the complainant on a permanent basis. The complainant's grievance is contained in a letter prepared by the union and signed by herself dated October 27, 1981.

11. By letter dated November 3, 1981, Mr. J. A. Seith, the employer's bindery superintendent, wrote to the complainant denying her grievance. He pointed out that the collective agreement permits the company to employ one apprentice for every four journeymen and that because the job opening was for a journeyman II *apprentice* and the complainant was already a journeyman II, there was no obligation for the company to offer that position to her. Nor was there any obligation to artificially create some higher position to which she might have been entitled.

12. On or about December 2, 1981, there was a "third step" meeting with representatives of the employer to discuss the complainant's grievance. The complainant was present for that meeting which lasted approximately three hours. The meeting canvassed not only the merits (or lack of them) of the grievance, but also the complainant's general concern that she should have greater access to more regular employment. However, her problem was not resolved to her satisfaction. There was a further meeting between the employer and union representatives on December 9, 1981, where the parties again canvassed the general question of job posting. However, once more there was no resolution of the complainant's specific claim.

13. On January 4, 1982, there was a meeting of the trade union's executive board where the complainant's grievance was discussed. Initially, the complainant testified that she knew nothing about the union officials' deliberations and remained in the dark about the status of her grievance. When pressed, however, she eventually admitted that not only did she know about that meeting, she was present and participated in the discussion. At that meeting there was some debate about the merits of the complainant's grievance and some doubts expressed about whether the employer's conduct contravened the terms of the collective agreement. It was resolved to refer the matter to the union's solicitors for an opinion.

14. On January 8, 1982, the complainant and certain trade union officials met with the union's solicitors and canvassed the facts, the terms of the collective agreement, and the applicable arbitral jurisprudence. Again, all present were sympathetic to the complainant's position, but there was considerable doubt about the merits of her grievance. The union's solicitor indicated that, in his opinion, there was no chance of winning the complainant's grievance because there had been no breach of the collective

agreement. However, he said that he would check into the matter further and advise if he found anything in the arbitral jurisprudence to alter his preliminary assessment. He didn't. He subsequently advised Ken Magnus, by this time president of the local union, that it would be useless to go to arbitration with the complainant's grievance, since it was without merit.

15. The solicitor's advice was accepted and raised at the regularly scheduled membership meeting in February, 1982. The members of the union present decided that, in all the circumstances, there was no basis for proceeding to arbitration with the complainant's grievance because all indications were that it could not possibly be successful. The grievor had no specific notice of this meeting. She testified that it was not her practice to attend membership meetings because, she said, she worked on an irregular basis and lived in Brampton. Ken Magnus testified that it was not the union's practice to give specific notice to grievors that their case would come up at the regularly scheduled monthly meeting, but that such matters did come up from time to time and it was expected that interested members would enquire or make arrangements to attend. This evidence was not contradicted by the complainant, who acknowledged that she knew that the regularly scheduled membership meetings did consider current grievances.

16. In any event, there is no indication that the complainant's presence at the meeting would have altered its conclusion in any way. The complainant asserts that it was improper for the union to even put the issue of her grievance before the membership because, she said, her fellow union members were merely laymen and should not be permitted to make a judgement about whether to proceed with her grievance to arbitration. Since the complainant's position is that the pros and cons of her position should not have been put to her fellow members at all, the Board cannot attach too much significance to her contention that she was not aware that her grievance might be discussed at the regularly scheduled February membership meeting.

17. Shortly after the February meeting, in March or early April of 1982, Ken Magnus met with the grievor and indicated that the trade union had decided not to proceed to arbitration with her grievance. On this point, I accept the evidence of Magnus and reject that of the complainant who asserted that she spoke to Magnus twenty or thirty times and that he was always evasive about the status of her grievance. There is simply no reason why the union would take such position. I find that this was simply an example of the complainant refusing to accept or acknowledge a result with which she did not agree. To put the matter colloquially, the grievor heard only what she wanted to hear. The present complaint was not filed until April 20, 1983 – almost a year later.

18. In or about June, 1982, the complainant approached the Ontario Human Rights Commission with an allegation that she had been discriminated against *by her employer* on the basis of age or marital status. Whether there is any basis for this complaint is not a matter for consideration by this Board. What is of interest is that there was no allegation against her union. From June of 1982, until at least February of 1983, the Ontario Human Rights Commission has been processing Mrs. Syme's complaint which, according to her, is still outstanding. The complainant asserts that she did not make any complaint against the respondent for more than a year because she was reluctant to do so, the Ontario Human Rights Commission was investigating her claim against her employer, and she had not been advised that there was any recourse against her trade union which could, albeit



indirectly, resolve the dispute with her employer. She said that it was only in February, 1983, when a Human Rights Commission official suggested that she file the instant complaint and arranged for the forms to be sent to her, that she decided to make a complaint against her union. According to Mrs. Syme, the officer had not suggested it previously, nor did he suggest that she consult a lawyer before commencing this proceeding.

19. The respondent union asserted that the delay of more than a year in filing this complaint is such that, pursuant to its discretion under section 89 of the Act, the Board should refuse to entertain it. The union asserted that it is all very well that the complainant has made allegations of impropriety against her employer, but it was not until a year later that she got around to making allegations of illegal conduct against her union -and only then on the belated suggestion of some official of the Human Rights Commission. The complainant argued that she was pursuing such remedies as she thought were available to her, and she should not be prejudiced because she was not aware that she could call her union's conduct into question until 1983, when the Ontario Human Rights Commission official told her that she should do so. In the result, however the Board does not consider it necessary to deal with this preliminary argument respecting timeliness because, on the evidence before it, the Board finds that there is no merit to Mrs. Syme's complaint, in any event.

## II

20. Section 68 requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgement of a lawyer.

21. Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which (as in the present case) the parties seek to amicably resolve their differences. As in the ordinary civil litigation process, it may be in the interests of both parties to seek an "out of court" settlement which is more modest than either of them might have obtained had they been entirely successful before an adjudicator. A settlement is a compromise solution which avoids the costs and uncertainties of litigation, and where it appears that the claim is without legal foundation or cannot be proved it makes little sense to proceed further.

22. These considerations are equally applicable to the settlement of disputes arising out of collective agreements. But there is an important difference. Unlike most parties in civil matters, the trade union and employer are bound together in a relationship

which will subsist so long as the employees continue to support the union and the employer remains in existence. That relationship, despite its adversarial aspects and legal veneer, is neither wholly adversarial nor strictly legal. It is essentially an economic partnership in which both parties must be concerned about the ongoing relationship and the equitable resolution of disputes which occasionally arise. Like a successful marriage, a productive bargaining relationship depends upon the development of a spirit of cooperation and compromise. Regardless of the arguable importance of any particular grievance, it will inevitably be only one of many which the parties will be required to resolve during the currency of their relationship; and, if either party obstinantly adheres to an unreasonable position, or continually presses trivial claims, the entire settlement process could be undermined, and their long-term relationship prejudiced. It can hardly further mutual trust and respect if union and management officials are required to spend needless hours discussing inconsequential or unfounded grievances. As a practical matter, a rigid insistence on one's "strict legal rights" or an insistence on proceeding to arbitration with doubtful claims is likely to provoke a response in kind, and yield only short term gains. As a matter of good judgement, and in the interests of sound industrial relations, a trade union should make reasonable efforts to settle grievances early in the process. I do not think there is any justification for processing obviously groundless claims simply because an individual employee demands his "day in court". Such position not only represents a waste of the employees' money in counsel and other fees associated with the arbitration process, but could also prejudice the ongoing and informal resolution of disputes, short of arbitration, where there might well be some contractual basis for the union's claim.

23. On the basis of the evidence before me, I cannot conclude that there has been any bad faith or discrimination in the processing of the complainant's grievance. Nor has the respondent's conduct been arbitrary. The union officials were sympathetic to the complainant and processed her grievance through several steps of the grievance procedure, but ultimately decided that it was without merit and should not proceed to arbitration. That decision was taken with legal advice, is probably right, and is certainly not unreasonable or "arbitrary" within the meaning of section 68 of the *Labour Relations Act*.

24. The respondent's officials might have been wiser to have told the grievor, from the outset, in clear and unequivocal terms which she could not misunderstand, that there was no basis for her grievance. It would also have been wiser if they had notified her of their intention to put the matter before the general membership - although, of course, the complainant does not agree that this step should be taken before proceeding to arbitration. However, in all the circumstances of this case, I cannot conclude that there has been a breach of section 68 of the *Labour Relations Act*. The complaint is therefore dismissed.

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**1800-81-U; 1971-82-R** Mauri Ahokas, et al, Complainants, v. The Canadian Union of Public Employees, Local 87, Canadian Union of Public Employees, Grace Hartman, G. LeBel, Eileen Okerlund, William McFarlane, Gloria Welch, Arlene Parker and Eileen Rice, Respondents; The Municipal Technicians Association of the City of Thunder Bay, Applicant, v. **The Corporation of the City of Thunder Bay**, Respondent, v. Canadian Union of Public Employees, Local 87, Intervener.

**Duty of Fair Representation - Unfair Labour Practice - Complainant para-professional and technical employees minority in unit - Historically occupying higher paid categories - Union deliberately negotiating to compress wage grid to economic disadvantage of complainants - Trade-off of minority rights no breach - No violation in manner of removal of negotiating committee members supporting complainants' cause - No intimidation - Restructuring of negotiating committee contrary to by-laws and misrepresentation of content of employer's offer to union membership designed to suppress bargaining interests of minority - Violation found**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

**APPEARANCES:** *F. J. W. Bickford, Leonard B. Roy, Stanley B. Zapior, J. Heaslip for the complainants and for the Municipal Technicians Association of The City of Thunder Bay; S. R. Hennessy, Gilles LeBel, Eileen Okerlund, William McFarlane, Eileen Rice and Gloria Welch for CUPE Local 87; no one appearing for The Corporation of the City of Thunder Bay in File No. 1971-82-R; Oliver N. Antilla for The Corporation of Thunder Bay in File No. 1800-81-U.*

#### **DECISION OF M. G. PICHER, VICE-CHAIRMAN; May 31, 1983**

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a violation of sections 68 and 70 of the Act by the respondent trade union. This complaint was consolidated with an application for certification by the order of the Board dated January 26, 1982. The matter raised in this complaint relates to the representation of a group of para-professional and technical employees within a larger bargaining unit represented by the respondent for the "inside" employees of The Corporation of the City of Thunder Bay.

2. The complaint is filed by seventy-six employees who allege that the respondent Canadian Union of Public Employees Local 87 (hereinafter "C.U.P.E. Local 87") and the named officers of the local William McFarlane, Gloria Welch, Arlene Parker and Eileen Rice as well as officers of the Canadian Union of Public Employees (hereinafter "C.U.P.E.") Grace Hartman, Gilles LeBel and Eileen Okerlund have acted in a manner that is arbitrary, discriminatory and in bad faith in the representation of the complainants contrary to section 68 of the Act. The complainant employees allege that C.U.P.E. Local 87 and their officers have manipulated the internal management of the bargaining committee of C.U.P.E. Local 87 and the conduct of general meetings in such a way as to arbitrarily affect the wage levels of the complainant employees and have intimidated them from the exercise of their rights within the local. Among other things, the complainants seek a declaration that there has been a violation of the duty of fair representation and an order for compensation in the amount of \$80,000 which they



maintain is the loss they have suffered as a result of the actions of the respondents. Through the application for certification the complainants, represented by the Municipal Technicians Association of the City of Thunder Bay, further seek to terminate the bargaining rights of C.U.P.E. Local 87 in favour of their own association.

3. The certification aspect of this matter is still pending, as fairly extensive examinations respecting the composition of the bargaining unit has been conducted. The parties are agreed that the Board's findings on the section 68 and 70 complaints, as well as the evidence heard respecting the functioning of the bargaining unit, may have a bearing on the Board's determination of the appropriate bargaining unit in the application for certification. Underlying this complaint is the submission of the grieving employees that they do not have a sufficient community of interest with the office and clerical employees who comprise the majority of the bargaining unit. This decision, therefore, is limited to a determination on the merits of the section 68 and 70 complaints. The parties are agreed that the Board should limit itself to declaring whether those sections have been violated, leaving the matter of remedy to be resolved in the fuller context of the application for certification.

4. To assess the merits of this complaint it is necessary first to appreciate certain background facts. C.U.P.E. Local 87 has for a good number of years represented the employees of the City of Thunder Bay. It has three separate bargaining units: service and maintenance "outside" employees; office, clerical and technical or "inside" employees and employees of the library. The bargaining unit that is the subject of this application is described in the collective agreement between C.U.P.E. Local 87 and the City of Thunder Bay as "all office, clerical and technical employees" occupying classifications set forth in a schedule to the collective agreement. The agreement in effect from January 1, 1980 to December 31, 1981, the period relevant to these proceedings included the following Schedule "A", listing eleven classification groups:

#### GROUP 11

Chief Drafting Technician  
Chief Technologist  
Subsidies Officer  
Senior Accountant  
Property Officer

Planner II  
Counselling Supervisor  
Rehabilitation Supervisor  
Chief Planning & Design  
Technician  
Application Programmer III  
Software Support Analyst

#### GROUP 10

Tax Supervisor  
Field Technologist  
Loan Officer  
Building/Plumbing Inspector  
Safety Officer  
Senior Drafting & Research Tech.  
Senior Buyer  
Senior By-law Enforcement  
Officer

Community Development  
Officer (NIP)  
Senior Worker  
Accountant  
Maintenance Management  
Technician  
Planner I  
Parks Development Officer  
Senior Drafting Technician

Senior Property Standards  
Officer

Gen. Engr. Technologist  
Junior Systems Analyst  
Application Programmer II

#### GROUP 9

Chief Cashier  
Intermediate Drafting Tech. II  
Traffic Technician  
Social Worker  
Accts. Payable Supervisor  
Planning Technician  
Life Skills Coach  
Senior Clerk - Utilities  
Project Supervisor  
Building Inspector

Community Planning  
Technician-NIP  
By-Law Enforcement Officer  
Property Standards  
Officer NIP  
Buyer  
Adult Protective Service  
Worker  
Local Improvement Clerk  
Paymaster  
Parks Technician  
Application Programmer I  
Family Service Worker

#### GROUP 8

Intermediate Drafting Tech. I  
Construction Inspector  
Licence Issuer  
Tax Clerk  
Sr. Building & Plumbing Clerk  
Day Care Centre Supervisor

Plan Examiner  
Intermediate Drafting &  
Research Technician  
Computer Scheduler  
Sr. Print Room Clerk  
Cost Control Clerk  
Sr. Social Services Clerk  
Junior Planner  
Zoning Inspector

#### GROUP 7

Surveyor Helper  
Equipment Maintenance  
& Cost Clerk  
Water Accounts Clerk II  
Senior Payroll Clerk  
Pool Supervisor  
Inventory Clerk

Sewer & Water Clerk II  
Graphics Illustrator  
Mrtg. & Tax Reg. Clerk  
Computer Operator II  
Storekeeper II  
Clerk VII  
Senior Homes Clerk

#### GROUP 6

Jr. Drafting Technician  
Senior Planning Clerk  
Accounts Receivable Clerk  
Payroll & General Accounting Clk.  
Senior Transit Clerk  
Day Care Counsellor

Utilities Work Order  
Clerk II  
Central Files Clerk  
Utilities Inspector  
Sewer & Water Clerk I  
Chauffeur

Utilities Clerk  
 Clerk VI  
 Senior Works Clerk  
 Junior Drafting & Research  
 Technician  
 Intermediate Duplicating Clerk  
 Parking Meter Technician  
 Cashier III  
 Computer Media Librarian  
 Decision Clerk

Activity Centre Program  
 Supervisor  
 Workmen's Compensation  
 Statistician  
 Bookkeeper  
 Clerk Weighman  
 Junior Building & Plumbing  
 Clerk  
 Computer Operator I  
 Clerk-Timekeeper  
 Records Clerk-Timekeeper  
 Data Entry Lead Operator  
 Secretary-Treasurer  
 (Committee of Adjustment)  
 Library Technician  
 Sr. Fire Services Clerk  
 Sr. Offices Services Clerk  
 Storekeeper I

#### GROUP 5

Utilities Work Order Clerk I  
 Utilities Long Distance Clerk II  
 Senior Accounts Payable Clerk  
 Social Asst. Clerk  
 Transit Clerk  
 Date Entry Operator II  
 Clerk V  
 Arrears Clerk II  
 Budget Assistant  
 Pollution Control Clerk  
 Tax Records Clerk  
 Intake Receptionist

Clerk-Steno III  
 Engineering Technician  
 Cashier II  
 Facility Supervisor  
 Junior Duplicating Clerk  
 Clerk-Dispatcher  
 Day Care Assistant III  
 Activity Centre Recreation  
 Worker  
 Appeals Clerk  
 Events Clerk  
 Accounts Clerk (Homes)  
 Data Control Clerk  
 Jr. Works Clerk  
 Driver Records Clerk

#### GROUP 4

Utilities General Clerk  
 Social Services Accounts  
 Receivable Clerk  
 Stationery Stores Clerk  
 Clerk-Steno II  
 Data Entry Operator I  
 Stenographer III  
 Box Officer Cashier  
 Tax Certificate Clerk  
 Utilities Long Distance Clerk I

Nursing Services Clerk  
 Tax Control Clerk  
 Clerk IV  
 Parking Ticket Clerk  
 Day Care Assistant II  
 Accounts Payable Clerk  
 Concession Operator  
 Summons Clerk  
 Cleaner II  
 Arrears Clerk I



Water Accounts Clerk I  
 Mail Cashier II  
 Vital Statistics Clerk

Research Clerk (Transit)  
 Time Clerk (Transit)  
 Business Office Clerk (Homes)  
 Accounts Control Clerk  
 Parks & Recreation  
     Accounts Receivable Clerk  
 Budget Control Clerk  
 Input Control Clerk

### GROUP 3

Receptionist & Information Clerk  
 Courier  
 Print Room Utility Clerk  
 Assessment Clerk  
 Clerk-Typist-Receptionist  
 Day Care Assistant I  
 Residence Worker  
 Mail Cashier I

Microfilm Clerk  
 Clerk-Stenographer I  
 Stenographer II  
 Clerk-Typist III  
 Clerk III  
 Cashier I  
 Cleaner I  
 Telephone Receptionist

### GROUP 2

Stenographer I  
 Clerk-Typist II  
 Mail Delivery Clerk

Clerk II

5. Schedule "A" also provides for three steps of remuneration in each group, and an ascending order of remuneration from Group 2, Group 11 being the highest paid classification.

6. While there is a certain mix of technical and clerical employees in the groups at the middle range it is common ground that the para-professional or technical employees tend to be concentrated in the top four groups while the lower groups have a greater concentration of employees performing clerical as opposed to technical functions. It is also common ground that the clerical employees constitute the substantial majority of the bargaining unit. The seventy-six grievors in this complaint are generally in the higher rated technician and para-professional groups; they would include planners, social workers, and employees exercising similar types of professional or technical skills and abilities.

7. The grievors' complaint is that the officers of the local, with the endorsement of the majority of the bargaining unit, have deliberately and arbitrarily manipulated the negotiation process to deprive them of what would have otherwise have been a greater share of the wage settlement in the collective agreement for 1980 and 1981. They also maintain that the alleged violations of the Act were condoned and assisted by the inaction or acquiescence of the members of C.U.P.E.'s national executive who are named as respondents.

8. The material facts are not in substantial dispute. The respondent union has represented the office, clerical and technical employees of The Corporation of the City of Thunder Bay for many years. Prior to negotiations for the 1980-81 collective agreement there were some five previous sets of negotiations for two year contracts commencing with 1970-71 and ending with 1978-79. The evidence establishes that over that period of time, and continuing with the 1980-81 collective agreement the percentage wage differential between employees at the bottom of the wage scale and those at the top has eroded substantially. The following table illustrates the wage rates payable at the maximum levels in Group 2 and Group 10 on the wage grid over that period of years.

C.U.P.E. CLERICAL AND TECHNICAL UNIT

SALARY SCHEDULE 1970 - 1981

DATE	<u>GROUP 2 AND GROUP 10</u>		% DIFF.
	ANNUAL RATE GROUP 2 MAXIMUM	ANNUAL RATE GROUP 10 MAXIMUM	
January 1, 1970	\$ 4,460.00	\$ 9,923.00	122.5%
January 1, 1971	4,728.00	10,518.00	"
January 1, 1972	5,148.00	11,118.00	116.0
January 1, 1973	5,534.00	11,952.00	"
January 1, 1974	6,326.00	12,900.00	103.9
July 1, 1974	6,546.00	13,120.00	100.4
January 1, 1975	7,184.00	14,399.00	"
January 1, 1976	8,583.00	15,798.00	84.1
January 1, 1977	9,100.00	16,766.00	"
January 1, 1978	9,859.00	17,525.00	77.8
January 1, 1979	10,185.00	18,104.00	"
January 1, 1980	12,156.33	20,075.33	65.1
January 27, 1980	12,552.18	20,471.36	63.1
January 1, 1981	13,681.88	22,313.78	"

The figures show that in 1970 employees in Group 10, who would generally be para-professional or technical employees were paid at a wage level representing a percentage differential over the Group 2 wage level of 122.5%. By January 1, 1981 that differential was reduced to 63%. Over the span of eleven years the employees in Group 2 who would generally be the lowest paid office and clerical workers, enjoyed a percentage increase in wages of 206.8% while those in the Group 10 wage level saw their wages only increase by 124.9%. According to the complainant's figures when weighed against the consumer price index, taking 1971 as a base of 100, in that eleven year period employees in Group 10 suffered a real dollars earnings loss of some 25% while employees in Group 2 experienced a real dollar earnings gain of 52%.

9. Comparing the highest and lowest group tends, naturally, to paint the picture most dramatically. It must be appreciated, for example, that employees in Group 6, most

of whom are clerical, also received a lesser percentage increase than those in Group 2, reflecting a real dollar gain in earnings of only 6% over the ten year period between 1971 and 1981. The undisputed fact remains, however, that there has been over the period of years a substantial compression of the wage grid in the bargaining unit to the relative disadvantage of those employees in the higher rated categories. The para-professional and technical employees who occupy the higher rated categories are in a minority position numerically in the bargaining unit. Their felt concern that their wages have been unduly and unfairly compressed over the years underlies this complaint.

10. A review of the wage provisions of the six collective agreements between 1970 and 1981 establishes that the compression of wages was achieved largely by the expression of wage increases in absolute dollar terms, as opposed to percentages. For example, in the 1978-79 contract for the first year all employees received an identical monetary increase of \$690.00 per annum. In the second year of the contract all employees received a wage increase of 3.3% with a cost of living allowance. That kind of blend of absolute dollar increases in the first year and percentage increases in the second year is found in all of the collective agreements negotiated over the eleven year period. It is the formula that has worked the wage compression over the years.

11. The compression in wages for the higher rated employees has become a cause of increasing concern to the municipality. Mr. Oliver Antilla, Manager of Personnel and Labour Relations for The Corporation of the City of Thunder Bay testified that as a result of the compression the para-professional and technical employees of the municipality are paid at rates substantially lower than those received by comparable employees in other municipalities in Ontario. According to Mr. Antilla the reverse is true for the clerical staff. By his estimate the wage levels of the clerical employees place them in the top 5% provincially while the wage groups of the complainant technical employees would be in the bottom 20 to 25% as compared to other municipalities. According to Mr. Antilla as a result the City has had considerable difficulty in hiring and retaining employees, notably social workers and computer technicians, in the higher rated categories. It is Mr. Antilla's evidence that going into the negotiations for the 1980-81 collective agreement the City resolved to rectify what it perceived as an unacceptably high degree of erosion in the wage levels of the top categories over the previous nine years.

12. It is necessary to retrace in some detail the history of bargaining for the 1980-81 collective agreement. In November of 1978 the bargaining committee for the inside collective agreement was elected. The members were Stan Zapior, Chairman, Leonard Roy, Arlene Parker, Eileen Rice and William Kuzik, alternate. Zapior, Roy and Kuzik were in Groups 11, 10 and 9 respectively, while Parker and Rice were in Group 7 and 6 respectively. Negotiations with the employer commenced in December, 1979. During the course of negotiations Mr. Zapior proposed that his casting vote be delegated to Mr. Kuzik who would otherwise have no vote. This was accepted without objection by the entire committee. The committee's original mandate from the general membership was to obtain a wage increase of \$1,500 across the Board plus 6% over a one-year contract. The City, on the other hand, wanted a two-year collective agreement.

13. After some seven negotiation meetings the parties went to conciliation on March 12, 1980. On March 13, 1980 the City made its first monetary offer in the form of a



two-year salary grid. The effect of the proposed grids was clearly to alleviate the compression and distribute greater increases through the higher categories. According to the unchallenged evidence of respondent, Eileen Okerlund, a C.U.P.E. representative who assisted the union committee as a resource person, the City's proposal would have had meant increases in the range of 11 to 12% at the top of the grid with increases of only 2% at the bottom. That offer was unacceptable to the negotiating committee, as were two similar offers put forward by the City on March 13, and March 14, 1980. The union's committee countered by proposing a \$1,000 increase plus 10% in the first year and \$500.00 plus 8% in the second year. It is significant to note that at this point the original mandate of the union committee and the proposal which it made to the employer were a blend of dollars and cents across the Board and a percentage increase and that there was no apparent split in the bargaining committee on that formula.

14. The beginning of the split came with the resumption of negotiations on March 25, 1980. It was then apparent to the union negotiating committee that the pattern of wage proposals being put forward by the City amounted to a sliding scale increase, with substantially greater rates of increase in the higher categories. The last proposal of the City would have given 10% to employees at the top of the scale and 4.4% to those in the bottom category. The union negotiating committee began to polarize over that issue. Mr. Zapior and Mr. Roy were essentially sympathetic to the sliding scale proposals being made by the City which tended to favour the higher categories and relieve the wage compression in the grid. Committee members Parker and Rice, on the other hand, were adamantly opposed to that kind of wage formula. While Mr. Kuzik expressed himself as personally favouring the City's approach he stated that he did not believe that the general membership would approve it.

15. It appeared on March 25, 1980 that the wage negotiations were getting nowhere because of the conflict between the union's mandate for a flat rate plus percentage and the City's approach to a sliding percentage scale. As a result a delegation was sent from the union committee to speak with City negotiators. Chairman Zapior and Eileen Okerlund went to the employer's caucus room and spoke with city representatives including Mr. Antilla and his assistant Mr. Herb Holmes. Ms. Okerlund opened the discussion by indicating the difficulty in negotiations was due in part to the fact that the union mandate was to obtain a flat rate plus percentage, and that the wage formula being forwarded by the City could not be accepted by the committee. Mr. Antilla then explained that the City had serious concern for the problem of compression in the wage grid and felt that it was essential to consider a sliding scale percentage as a means of redressing the imbalance. At this point union committee chairman Zapior interjected to state that he agreed with what Mr. Antilla was saying. Ms. Okerlund then sought to break off the conversation and when they had left the room she warned Zapior against making comments of that kind in the presence of the City as they would inevitably destroy the confidence that the committee members must have in one another.

16. After that meeting, on March 25, 1980 the union tabled a new proposal for wage increases being \$350.00 plus 9% effective January 1, 1980 and 9% across the Board effective January 1, 1981 with a COLA clause effective January 1, 1981 to trigger at 8%.

17. Later that day a second meeting between the parties took place when the employer's representatives asked to meet face to face with the union committee in its

cacus room. At that second encounter Mr. Antilla again spoke about the problem of compression, explaining that it was the basis for the City's formula for wage proposals. Mr. Zapior responded that he believed Mr. Antilla but that the City's spokesman would have to convince two of the union's committee members. When the City delegation left the union's negotiating room there followed what Ms. Okerlund described without contradiction as a "free for all". Members Rice and Parker expressed extreme displeasure at Zapior's comment, with Mr. Roy agreeing with them that Mr. Zapior should not make comments of that kind in front of the employer's representatives.

18. The following day, March 26, 1980, the City made yet another proposal based on a sliding scale percentage. At this point the polarization of the union committee was complete. Mr. Zapior and Mr. Roy felt that the union committee could counter on a sliding scale basis while members Rice and Parker felt that it could not, and that to do so was beyond the committee's mandate. Mr. Kuzik's position remained the same in that he was personally inclined to favour a sliding scale but believed that the membership would not accept it. When the committee resolved to reject the City's proposal but could not agree among themselves on what course the union should follow Mr. James Pearce, then the Chairman of the outside bargaining unit negotiation committee who sat as an observer in conciliation suggested that the union committee should "get its act together" and that the best thing to do was to go back to a general membership meeting for further direction. This was done and a general membership meeting was called for March 30, 1980.

19. By the time of the general membership meeting the political differences between the two factions in the negotiating committee had percolated down to the general membership. At the general meeting Mr. Roy made a presentation of some twenty minutes to a half an hour, using charts and graphs to show the effects of three different kinds of wage proposals: dollars and cents across the board, a combination of money across the board and a percentage increase across the board and a straight percentage increase. Mr. Roy openly favoured a formula that would redress the compression in wages for the higher categories. Some members in attendance were obviously hostile to Mr. Roy's point of view and interrupted his presentation with negative comments. On the whole, however, it is clear that he was given the fullest opportunity to present his viewpoint to the general membership. Ms. Rice and Ms. Parker also spoke, expressing their view that the employer's proposal of a sliding scale was unfair, pointing out the difference between the 5% increase at the bottom of the grid and the 11% increase to those in the higher categories. After an extensive and at times heated discussion the meeting finally voted by secret ballot to reject the City's proposal and, in another vote, gave the negotiating committee a mandate to negotiate a wage increase expressed in dollars across the Board in the first year and a percentage across the Board in the second year.

20. Despite the outcome of that meeting Mr. Zapior and Mr. Roy remained determined to redress the effects of wage compression in the higher categories. When the union committee reconvened on April 8, 1980 to resume negotiations with the City they, with the support of Mr. Kuzik, proposed a wage increase of 98¢ per hour across the Board in the first year with a percentage across the Board in the second year. Mr. Zapior explained to the union committee that the 98¢ was the amount necessary for him to realize a wage increase of \$1,500 in the year, the amount he saw as necessary to redress

losses he had experienced because of compression. That proposal was plainly not going to be acceptable to the City. On March 12, 1980 the outside bargaining committee, which usually sets the pattern for the inside workers, had settled for a 72¢ per hour across the Board increase which translated roughly to 8%. According to Mr. Pearce, whose evidence on this point we accept without reservation, the union proposal for a 98¢ across the Board increase, which was in fact a higher demand than its last position, was unrealistic in the extreme. The proposal was nevertheless tabled and, not surprisingly, was rejected by the City.

21. The next day on April 9, 1980 the City indicated that it was not moving from its earlier monetary proposal and that it would not be prepared to do so unless the union's proposal was scaled down. In the result nothing had changed and the negotiations had effectively broken down.

22. At this point the division in the union negotiating committee had degenerated to outright mistrust. When it was proposed on April 9th that there be a face-to-face meeting between the two committees, a proposal favoured by Zapior and Roy whose negotiating stance tended to favour the City's approach, members Parker and Rice stood adamantly opposed. Ms. Okerlund testified that she felt that the two committees should not meet face-to-face in light of Mr. Zapior's earlier statements of sympathy to the City representatives. She then advised the committee that they should not meet with the City if they were not unanimous in the wish to do so, and her advice was followed.

23. It is plain that at that point committee members Parker and Rice, as well as observers Okerlund and Pearce had serious concerns for both the integrity of the committee and the bargaining tactics being adopted by Mr. Zapior and Mr. Roy with the voting support of Mr. Kuzik.

24. It is then that the events giving rise to this complaint began to unfold. At the next regular meeting of the union executive, from which Mr. Zapior the chairman of the inside agreement committee was absent, Gloria Welch, then chief steward of the inside bargaining unit, made a motion, seconded by Ms. Rice "that a meeting be set up immediately with the Executive and the Inside Agreement Committee and that the area representative and Assistant Regional Director be allowed to attend if they so wish". The motion carried and a special meeting of the executive with the inside agreement committee was scheduled for Sunday, April 20, 1980. (It should perhaps be noted that there is some uncertainty as to whether the General Executive Meeting which scheduled the special meeting took place on April 13th as reflected in the Minutes or on April 9, 1980. There is evidence to suggest that the 13th is a typographical error; in any event the Board sees no cause for concern over this discrepancy in the evidence).

25. The evidence establishes that on or about April 17, 1980 William McFarlane, President of the Local, phoned Mr. Zapior at his home to advise him of the special meeting to be held on Sunday April 20, 1980. According to Mr. Zapior's evidence Mr. McFarlane told him that he wanted the inside bargaining committee to be in attendance and asked him to relay the message to Mr. Roy. According to Mr. Zapior's evidence he advised Mr. McFarlane that he could not attend because of a prior family commitment and asked that the meeting be rescheduled for Monday the 21st. By Mr. Zapior's account Mr. McFarlane said that he would discuss that with the executive and get back to him,



but never did. Mr. Zapior's evidence is that Mr. McFarlane did not discuss with him the subject matter of the meeting, saying simply that it was an important meeting and that the presence of the committee members was required. When Mr. Zapior advised Mr. Roy of the meeting he learned that he too could not attend because of a prior commitment. Shortly thereafter, Mr. Zapior left a message on Ms. Parker's desk at work advising her that he and Mr. Roy could not attend and asking her to relay the content of the proceedings to him.

26. Mr. McFarlane's account of his conversation with Mr. Zapior is not in substantial contradiction. He testified that he called Zapior on Monday morning at work and asked him to tell Mr. Roy about the meeting scheduled for Sunday April 20, 1980. According to Mr. McFarlane he indicated that the meeting was to discuss the problems that the bargaining committee was having. According to Mr. McFarlane, Zapior called him back later and said that he could not attend and asked for the meeting to be changed to Monday the 21st. McFarlane testified that he then told Zapior that if he did not get back to him the meeting would go as scheduled. There is no direct evidence before the Board whether anyone called Mr. Kuzik in advance of the April 20th meeting. The evidence of Mr. McFarlane, however, establishes that when the meeting began he noted to those present that Roy and Zapior said that they could not attend and then telephoned Mr. Kuzik to tell him that the meeting was about to start. According to Mr. McFarlane Mr. Kuzik told him that he was advised by Mr. Zapior that the meeting had been cancelled. McFarlane then told Kuzik that Zapior had no authority to cancel the meeting and that it was still going on. Kuzik then advised McFarlane that he could not get a baby-sitter and would not be able to attend. The special executive meeting was called to order at 7:15 April 20, 1980. As a result the only committee members present at the special executive meeting of April 20th were members Rice and Parker along with observers Pearce and Okerlund.

27. The evidence of what transpired at the special executive meeting of April 20, 1980 was given to the Board by Mr. Pearce, Ms. Okerlund, Ms. Welch and Mr. McFarlane. The thrust of their evidence is that the meeting heard from committee members Rice and Parker the difficulties which had arisen because of the split between its members. The consensus was that Mr. Zapior and Mr. Roy were not following the mandate given to the committee by the general membership. As a result of the discussion the executive board formulated a recommendation to be put before a special meeting of the inside membership to be scheduled for Sunday April 27, 1980 calling for the resignation of Mr. Zapior, the chairman of the committee, as well as that of Mr. Roy and that Mr. Kuzik be returned to his capacity as observer with no vote.

28. The next day Mr. Zapior and Mr. Roy were sent the following letter by Mr. McFarlane:

RE: SPECIAL EXECUTIVE MEETING

At a Special Meeting of the Executive Board of C.U.P.E. Local 87, held April 20th, 1980, it was decided that a Special Meeting of the Inside Membership be called for Sunday, April 27th, 1980 at 7:00 p.m., with the following motion to be recommended and presented to them, for their consideration.

THAT THE EXECUTIVE BOARD  
recommendation be:

That we demand the resignation of the Chairman of the Inside Agreement Committee, Mr. S. Zapior and one (1) member of the Committee, Mr. L. Roy and that the observer, Mr. B. Kuzik remain in that capacity of observer only, with voice, BUT NO VOTE.

29. The general membership was advised of the meeting to oust Mr. Zapior and Mr. Roy by the following notice:

**C.U.P.E. 87 - INSIDE**

**IMPORTANT**

SUNDAY APRIL 27, 1980

7:00 P.M.

LAKEHEAD LABOUR CENTRE

CRUCIAL NEGOTIATION REPORT AND  
THE COMPOSITION OF THE COMMITTEE.

It appears that Mr. Kuzik was not given any special notice of the special general membership meeting or its potential impact on him.

30. The special meeting of the general membership was convened on the evening of April 27, 1980 at the Lakehead Labour Centre in Thunder Bay. The meeting was well attended, with approximately 130 inside employees present. The President of the Local, Mr. William McFarlane, was in the chair. At the outset of the meeting he recognized Ms. Gloria Welch who immediately put forward a motion in the terms of the recommendation of the Executive Board that the resignation of Mr. Zapior and Mr. Roy be requested and that Mr. Kuzik be placed in a non-voting capacity as a member of the negotiating committee for the inside employees collective agreement.

31. It appears that a considerable amount of discussion ensued. The evidence establishes that the chairman advised both Mr. Zapior and Mr. Roy that they would be given the opportunity to address the meeting after the complaints about their conduct had been discussed. In other words, they were given the opportunity to have the last word. During the discussion bargaining unit member John Labate challenged the legality of the proceedings. Chairman McFarlane responded that the meeting was in all respects regular and lawful and ruled that it should proceed.

32. The general discussion of the meeting centered on the split in the bargaining committee and the allegation that Mr. Zapior and Mr. Roy were essentially ignoring the mandate of the general membership and were not negotiating in the best interests of the bargaining unit as a whole. The discussion concluded with Mr. Zapior and Mr. Roy speaking on their behalf and stating their view that they had done nothing improper and that no reason was put before the meeting to justify a demand for their resignation. Mr. Kuzik was also present at the meeting but the evidence does not disclose that he held or

expressed any opinion whatever on the subject of the motion. Following the statements by Mr. Zapior and Mr. Roy a secret ballot vote on the motion was held. The motion passed by a margin of 67 votes to 61. The announcement of the result caused a considerable stir in the meeting. Although Mr. McFarlane reminded those present that the meeting had not concluded it appears that some 30 employees, including Mr. Zapior, Mr. Roy and employees sympathetic to their cause then walked out.

33. When the meeting was resumed the floor was opened to nominations for new members of the negotiating committee to replace Zapior and Roy. Gloria Welch and Bill Kuzik were subsequently nominated and elected. In the result Mr. Kuzik went from his non-voting status to being a full voting member of the committee. It also appears that the committee's composition changed from that of a five person committee with a chairman and a non-voting observer to a four person committee with no chairman and no observer.

34. No clear explanation was given to the Board for the decision not to have a new committee chairman. When asked in cross-examination why no chairman was provided for in the reconstituted committee Mr. McFarlane could not give any explanation. He conceded that under the union's constitution neither Ms. Rice nor Ms. Welch could take the position of chairman because they were already office holders in the union, being recording secretary and chief-steward respectively. Whatever the rationale for there being no chairman, it is plain from the documentary evidence before the Board that that was a deliberate and considered choice made by the executive committee at its meeting of April 20, 1980 in anticipation of the impeachment of Mr. Zapior and Mr. Roy. The minutes of the special executive meeting showed that four motions were considered and voted upon by the executive in preparation for the special membership meeting which ousted Zapior and Roy. They are recorded as follows:

Moved and seconded Welch/Angus that the executive board recommend to the Inside Members of C.U.P.E. Local 87 that we demand the resignation of the Chairman of the Inside Agreement Committee, S. Zapior and of one member of the committee, L. Roy and that the observer B. Kuzik remain in the capacity of observer only, with voice but no vote. Carried.

Moved and seconded Welch/Petersen that should our initial recommendation be approved we hold an election for a new chairman and one committee member at the special meeting. Defeated.

Moved and seconded Petersen/Welch that should our initial recommendation be approved we hold an election for 2 negotiations committee members with the spokesman decided on in committee. Carried.

Moved and seconded Welch/Angus that we hold the special membership meeting on Sunday April 27, 1980 at 7:00 P.M. at the Lakehead Labour Centre. Carried.

35. It is clear from the second and third motions that prior to the meeting which removed Roy and Zapior the executive decided that there should be no new chairman on



the reconstituted committee. Neither Mr. McFarlane, Ms. Welch, Mr. Pierce, or Ms. Okerlund, all of whom were present at that meeting, were forthcoming in their evidence before the Board to explain why that unusual course was adopted. This aspect of the evidence, which causes the Board some concern, will be discussed more fully below.

36. Mr. Zapior and Mr. Roy did not accept their removal from office. On April 29, 1980 they wrote the following letter to Mr. Antilla, the Manager of Personnel and Labour Relations for the City of Thunder Bay:

April 29, 1980

Dear Mr. Antilla:

Re: Composition of Inside Agreement  
Committee

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This is to advise that we have enquired into the legality of the City of Thunder Bay negotiating with any other Committee other than the original Agreement Committee respecting the 1980-81 Agreement.

The following is in support of the aforementioned:

- 1) The persons elected in our stead were elected contrary to the provisions of the C.U.P.E. constitution.
- 2) We, the undersigned, have not resigned from the said Committee.
- 3) Any Agreement entered into with any other Committee other than the original Agreement Committee will be challenged and will be deemed to be null and void.

We, the undersigned, will be in attendance, acting in our elected positions, at the mediation meetings scheduled for May 1st and 2nd, 1980.

Please acknowledge receipt of this letter.

Yours sincerely,

(signed)	(signed)
S. Zapior, Chairman	L. Roy, Member
C.U.P.E. Local 87, Inside Agreement Committee	

37. Copies of the above letter were sent to Mrs. Grace Hartman, National President of C.U.P.E. as well as a number of national and local officers including Mr. McFarlane. On April 30, 1980 Mr. McFarlane wrote the following memorandum to Zapior and Roy.

Since we have not received your voluntary resignations demanded by the members on April 27, 1980 at a special meeting called to

determine the composition of the inside bargaining committee, we have no alternative but to advise you that you have been replaced by Gloria Welch and Bill Kuzik, duly elected. The management have been notified of your replacements and that you no longer represent the inside bargaining unit of Local 87 C.U.P.E.

38. Mr. Zapior testified that after his ouster from office he contacted Mr. J. F. McMillan, Director of Organizing for the C.U.P.E. national in Ottawa. Mr. Zapior testified that Mr. McMillan expressed doubts about the propriety of the way in which he and Mr. Roy had been removed from office and indicated they should attend at the next negotiating sessions scheduled for May 1 and 2. That is what they did. The evidence establishes that they went to the Red Oak Inn Motel in Thunder Bay on May 1st with the intention of taking part in the mediation meetings as full members of the committee. They were met with the newly constituted committee as well as the mediation officer and respondent Gilles LeBel, C.U.P.E.'s Assistant Regional Director for the Region of Ontario.

39. To appreciate the position of the respondent Grace Hartman and Mr. LeBel in the context of the facts it is helpful to note at this point Mr. LeBel's role and authority. The Canadian Union of Public Employees is a confederation of autonomous locals. While the locals send delegates to the national convention and elect members to the national and regional executives from among their members they are essentially autonomous in the administration of their own internal affairs. Regional representatives like Ms. Okerlund and national representatives like Mr. LeBel are not in a position to make executive decisions for a local or to direct them on what course they should follow. The officers of the national can only act in an advisory capacity, lending their experience and suggestions to the extent they may be accepted by the executive or membership of the local. Decision making on local matters in CUPE is made at the grass roots.

40. The evidence establishes that Mr. LeBel had been involved in Local 87's negotiations, both for the outside and for the inside negotiation of the 1980-81 collective agreement. As a resource person with some knowledge of the negotiating history Mr. LeBel was aware of the events surrounding the removal from office of Zapior and Roy. When they proceeded to the mediation meeting on May 1, 1980 Mr. LeBel met them and took them aside for a private conversation. Mr. Zapior's account of that conversation is that Mr. LeBel undertook to Mr. Zapior and Mr. Roy that he would represent the interests of the higher rated employees in the bargaining that was about to take place. Mr. LeBel denies that characterization of what he said to the two ousted officers. According to his testimony he had no authority to act as the agent of anyone in negotiations and did not make any undertaking that he would do so. He stated to the Board that Roy and Zapior seemed extremely angry and frustrated and that he attempted to calm the waters. He testified that he did advise them that it was best if they did not attend the negotiation meetings but that he gave them his commitment that at the end of the mediation round he would report to them on what had transpired.

41. In the mediation meetings of May 1 and 2, 1980 the newly constituted union negotiating committee promptly abandoned the 98¢ increase proposal formulated by Mr. Zapior and Mr. Roy with the support of Mr. Kuzik. At 8:00 a.m. on May 1 the union's across the board monetary proposal was 75¢ and by 8:00 p.m. that evening it was reduced to 70¢ across the board in the first year.

42. The evidence establishes that the mediation meetings of May 1 and 2, 1980 involved a continuation of the tension between the union and the City on the formula to be used for wage increases. According to the evidence of Ms. Welch the first offer by the City on the issue of wages contain the following provision:

That Schedule "A" be amended as follows:

Effective January 1, 1980 the Union membership shall have the option of choosing between an increase of 8-1/2% across the board or 6% plus 20¢ across the board. Effective January 1, 1981 the schedule will be increased by a further 9% across the board.

Attached to the draft memorandum of settlement proposed by the City was a salary grid breakdown with notations indicating that the City had also considered a 67¢ across the board increase, and apparently viewed that amount as roughly equivalent to the percentage offers. Seeing that as a sign of a way to move the City off its percentage offers the union committee unanimously agreed to counter with an across the board increase of 67¢ in the first year. In response to that the City re-submitted its previous offer with the addition of the 67¢ across the board as an option for the first year wage increase. The draft memorandum of agreement which it finally submitted to the union on May 2, 1980 therefore contained the following provision:

That Schedule "A" be amended as follows:

Effective January 1, 1980 the Union membership shall have the option of choosing between an increase of 8-1/2% across the board or 6% plus 20¢ across the board or 67¢ across the board. Effective January 1, 1981 the schedule will be increased by a futher 9% across the board.

43. The union's bargaining committee was happy to receive that offer because it allowed the possibility of a dollars and cents across the board increase in the first year, something it had been after at least since the special general membership meeting of March 30, 1980 when that became its mandate. The committee did not, however, sign the memorandum of agreement in such a way as to turn it into a tentative settlement. Rather, there being two further language provisions respecting employee classification still outstanding, it simply indicated to the City that it would submit the City's last monetary offer to the membership for their consideration.

44. It is at this point that semantics come into play. The evidence of Mr. Antilla clearly establishes that the City considered that its last monetary offer was in the nature of a three-way choice to be put to the employees. The evidence of Ms. Welch, on the contrary, expressed the view of the union negotiating committee that the "last" offer of the City was the proposal for 67¢ across the board in the first year. According to her evidence that is the "last offer" which the committee decided to bring back to the general membership for their consideration.

45. The evidence clearly establishes that Mr. LeBel, who was privy to the deliberations of the union negotiating committee, did not take away the same impression



of what would be put to the general membership. His own evidence and the evidence of Mr. Zapior establish that on May 3, 1980 Mr. LeBel reported to Mr. Zapior, pursuant to his earlier undertaking to do so, respecting the state of the negotiations. At that time Mr. LeBel told Mr. Zapior that the City's final position consisted of three offers, with the employees to be given the choice between three separate wage increase formulas. LeBel then declined to give Mr. Zapior the details of the offers in advance of the general membership meeting which was set for May 4, 1980 and told him that he would have to wait for the general meeting to get the details of the various options put forward by the City. That, however, was not to be.

46. The last event in this dispute, one which figures substantially in the grievance of the complainants, is what transpired at the general membership meeting of May 4, 1980. The meeting, which began at 9:25 a.m. on that Sunday morning, was chaired by Mr. McFarlane with Ms. Rice acting as the principal spokesman of the negotiating committee. According to the union's minutes there were 204 voting members of the inside bargaining unit in attendance. Mr. LeBel was not present.

47. Mr. Zapior and Mr. Roy were surprised to find that the final offer of the City was described in the sheet prepared by the union negotiating committee and handed out at the meeting as being simply 67¢ across the board in the first year and 9% in the second year. That did not correspond with what they had been told by Mr. LeBel. During the course of the meeting Mr. Zapior asked the chairman and Ms. Rice whether there was not something more to the final proposal of the City, stating that it was his understanding that the City had made an offer which consisted of three separate options to be put to the membership. It appears that Ms. Rice, who did not testify, then replied that the offer of 67¢ across the board in the first year with 9% in the second year was the "final" proposal put forward by the employer. Her statement, according to notes taken by Mr. Zapior at the time was: "That was their final offer".

48. Mr. Zapior and Mr. Roy became extremely upset at what they and the general membership were being told in light of their prior understanding through Mr. LeBel. When Mr. Zapior did not succeed in getting any clarification of the alternative offers through Mr. MacFarlane or Ms. Rice Mr. Roy took the floor and accused the committee, asking why they would not tell the members the truth about the City's offer. In a heated exchange Mr. McFarlane then ruled Mr. Roy out of order and told him that if he persisted he would have him physically removed. After that Mr. Roy approached Ms. Okerlund where she was sitting and asked her to speak up and explain how the City's proposal was in fact a three-part offer. She told him that she could not. In a piece of evidence that is somewhat puzzling to the Board she explained at the hearing that she felt that it was not her position to speak about the offer although, in her words, "I was open to a question from the floor".

49. Ms. Okerlund's account of what took place at the general membership meeting of May 4, was vague at best. In her testimony she had some recollection of a question being asked as to whether there had been "any other offers". Her recollection failed her as to what response was given though she did recall that the chairman "seemed to be saying that the member was out of order". Mr. McFarlane's recollection of what he said when he was questioned by Zapior and Roy about a final offer in three parts having been made by the City is that he responded that there had been many offers made by the City

but that the 67¢ across the board was the “final offer” which it had made. Ms. Welch’s testimony reflected substantially the same view. She testified that she felt that the questions put by Zapior and Roy “were all answered” and, went on to explain “we didn’t consider making a copy of the City’s written proposal available ... we didn’t perceive it as three options”. She reiterated the view expressed by Mr. McFarlane and apparently first expressed by Ms. Rice at the meeting that the 67¢ across the board increase in the first year was the City’s “last” offer.

50. The membership voted by a margin of 141 to 58 in favour of accepting the terms which had been presented by the negotiation committee and endorsed the committee’s stance to reject the position of the City on Articles 29.03 and 29.04 relating to classification.

51. That one outstanding item remained the stumbling block between the parties for some time longer. On May 15 and 17, 1980 two special membership meetings were called to bring the members up to date and to obtain a strike mandate to be used if necessary. With a combined attendance of 261 voting members at both meetings the committee’s position on the remaining item in dispute was endorsed and a strike mandate obtained. It appears that on May 15th, prior to the first special general meeting called by the union for that day the content of the City’s three-part offer of May 2, 1980 was made available to the employees at City Hall. While the evidence of Mr. Antilla as to how printed copies of the City’s proposal came to be made available or given to employees at City Hall on that day was evasive, the Board is satisfied that the City’s negotiators were responsible for making the document available to the employees that day. While the evidence is not clear as to how the document was distributed or how many employees received it, it can be safely concluded on the evidence that its contents became general knowledge in the work place or on about May 15, 1980.

52. Negotiations continued between the union and City with respect to the one remaining item in dispute until that issue was ultimately resolved, fortunately without recourse to strike or lockout. On May 27, 1980, 140 employees in the bargaining unit attended a ratification meeting at the labour centre in Thunder Bay and accepted the memorandum of agreement then signed by both committees by a margin of 125 to 14, with 1 ballot spoiled. At this point, however, Roy and Zapior, along with a substantial number of employees in the higher noted categories had begun the chain of protest leading to this complaint and had virtually withdrawn from participating in any union meetings.

53. If the bargaining had ended, the bitterness and division in the bargaining unit had not. What originated as a split in the bargaining committee in March of 1980 degenerated into a major division between two segments of the bargaining unit. On May 5, 1980, 56 members of the bargaining unit sympathetic to the position of Mr. Zapior and Mr. Roy addressed the following petition to the respondent Grace Hartman, National President of the Canadian Union of Public Employees:

Dear Sister Hartman:

We the undersigned, members of C.U.P.E. Local 87, Thunder Bay, Ontario, request that the National President place our local under

administration until a full and complete investigation of the Collective Bargaining Practices and the Financial Operations of our Local Union is determined by the National President and the National Secretary Treasurer.

As a result of the request of the petitioners Ms. Hartman caused an audit to be taken of the financial records of the local and assigned Mr. LeBel to investigate. The evidence establishes that on June 26, 1980 Mr. LeBel convened a general meeting of the membership of the local in furtherance of his mandate to investigate the problems raised by the petition. At that time he advised those in attendance of the results of the audit, informing them that a full audit had been done and that no irregularities had been disclosed. The evidence establishes that although Mr. Zapior was in attendance no complaint was raised by him or any one else respecting his removal from office or any other aspect of the affairs of the negotiating committee or the executive of the local. Mr. LeBel was, of course, aware of the events that had transpired from his own involvement as an advisor in the negotiations.

54. The evidence is clear that there was adequate notice to the membership of the meeting to be conducted by Mr. LeBel and of the opportunity to be given to any one who wished to raise concerns or ask questions. The following notice was sent by Mr. McFarlane to all members:

#### SPECIAL MEETING

#### RE PETITIONS OF NATIONAL - INQUIRY TO BE HELD:

THURSDAY JUNE 26, 1980 7:30 P.M.

LAKEHEAD LABOUR CENTRE:

Dear Brothers & Sisters:

A considerable number of Local 87 members have petitioned the National Office, questioning the legality of the change made to the inside bargaining committee during negotiations, and also requesting investigation into the financial affairs of the local.

An auditor from the National Office of C.U.P.E. has conducted an audit of the local's financial affairs, and G. LeBel Assistant Regional Director has been asked to conduct an investigation into the matter of changes to the negotiating committee.

For the above purposes a SPECIAL MEETING will be held June 26, 1980 at 7:30 P.M. at the Lakehead Labour Centre. All members who signed the petitions and any other members should be there to express their concerns, and have any questions pertaining to the above issues answered.



Brother G. LeBel will conduct the meeting.

Fraternally,

Bill McFarlane, President

Eileen Rice, Recording Secretary

Very shortly after the meeting Mr. LeBel reported to Ms. Hartman in writing. Part of his report, dated July 11, 1980, relating to the issues in this complaint is as follows:

Upon the direction of the Ontario Regional Director Brother O'Keeffe, I have investigated the complaints and allegations submitted by certain Members of this Local Union and these complaints and allegations were submitted to your Office under the form of two (2) Petitions - one bearing the date of April 30th, 1980 and the other May 5, 1980.

After having carefully examined the contents of the Petitions it was decided it would be best to conduct this investigation in two phases with phase one being an audit of the financial transactions of the Local Union for a given period of time in order to ascertain proper conducting.

Phase two consisted in holding a Special Membership Meeting of the Local Union in order that all complaints and allegations could be submitted and substantiated wherever possible.

• • •

3) Removal of two (2) Members from the Negotiating Committee, namely brothers L. Roy and S. Zapior—a considerable amount of difficulty is shown here by background information and I have personal [sic] knowledge and information of the situation inasmuch that I was personally involved in assisting both the Outside and Inside Bargaining Units during the period of negotiations for the renewal of the Collective Agreements.

My involvement came about first of all when the Outside Section proceeded to Mediation which I attended and whereby tentative terms of settlement were reached. I subsequently assisted the Inside Bargaining Unit in extended and protracted Conciliation and Mediation.

There is history of strong rivalry between the Inside and Outside Units, more especially on the matter of negotiations and the two Bargaining Units, for quite a number of years, have not consulted each other or co-operated in establishing proposals and amendments which would reflect a unified stand on items of common interest. One unit simply operates independent from the other.

As well, one must take into contention the permanent representative assigned to this unit, Brother Lennon, was off sick commencing during the month of May, 1979 and a replacement in the person of Ms. Eileen Okerlund came on the scene which did not lend itself to an ideal situation (without casting any reflection whatsoever on Sister Okerlund) inasmuch that Sister Okerlund, as you are aware has been the Stenographer in the Thunder Bay Office for a period of approximately eight years and the Membership of Local 87 simply did not treat her as a representative and could only view her as the Clerical Employee.

There were serious differences of opinion amongst the Inside Negotiating Committee and this serious difference centred primarily on the form of the general wage increase to be negotiated. Three (3) Members of the Negotiating Committee felt strongly about negotiating a general wage increase in the form of Dollars across the board, while the other two (2) felt just as strongly to negotiate a general wage increase in the form of Percentage across the Board.

Without reciting a blow by blow description, this serious difference of opinion led certain Members of the Committee to complain to the Executive Board of the Local Union, who in turn called a Special Meeting of the Board in order to consider the matter and rightly or wrongly at a very very crucial time in negotiations, it was decided to demand the resignation of Brothers Roy and Zapior.

Because of the terminology used in the request and Motion of the Executive Board which *demand*ed the resignation of the two Brothers, they in turn did not deem it advisable to submit their resignation, thus causing the Executive Board to entertain another Motion to the effect that if Brothers Roy and Zapior did not resign they would be removed from the Committee and an election for substitutions would take place.

As I have stated earlier, rightly or wrongly, these two Brothers were removed from the Committee by way of a Special Membership Meeting and the Membership voted by a very narrow vote to remove the two Members from the Committee. The result of the vote was 67 in favour of removing and 61 in favour of not removing.

During the transpiring of this event I was contacted by representative Okerlund and it was my advice to her to try and advise and counsel the Local Union, including the Executive Board, of not seeking the resignation of the two Brothers as well as not replacing them on the Committee because it would definitely and very positively indicate to the Employer that we, the Union, had very serious difficulties internally and that such a move would only be adverse and detrimental to the Membership and also that the matter could be contained within the Committee as best as we could.

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Possibly in closing with general remarks, the most serious question arising out of all of this matter being "Did the Local Union have power in accordance with its By-Laws, to remove the two Members from the Negotiating Committee?"

On this specific point I would submit the Membership of this Local Union had the power to elect, thus had the power to remove, subject to same being done in accordance with the majority will of its Members.

Last, but not least, where the Local Union is seeking a ruling concerning whether the National Constitution has been contravened or not, I have very respectfully left this point with you as you are the sole interpreter of the said Constitution.

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55. The investigation of Mr. LeBel, coupled with the financial investigation of auditor David Laventure of C.U.P.E.'s Ottawa office, resulted in a letter from respondent Grace Hartman, National President of the union to Ms. Rice dated November 4, 1980. It is as follows:

Dear Sister Rice:

This has reference to a registered letter dated April 30 and signed by a substantial number of members requesting my comments on the removal of two members from the negotiating committee and accompanying petitions demanding a financial review of the Local.

As you are all aware, the matter was referred to Brother Pat O'Keeffe and a full investigation has taken place. An in-depth audit was conducted by Brother Dave Laventure and the financial affairs of the Local were determined to be in extremely good condition.

With respect to the complaint about removing the two brothers from the negotiating committee; it would appear from the information you made available to me that there are many ingredients which led to the action which was taken. It is my personal view that it was an unfortunate matter in that the wording indicated the resignation of the two brothers was "demanded". It suggests that Brother Zapior and Brother Roy had, by some means, committed an offense of a nature that warranted a "demand" for their resignations.

I am sure you are all aware of the history of the position which has existed between the inside and outside components of the Local. Within a situation of that character, often times the words used in any discussion or disagreement have a connotation which is not intended.



That the issues were processed in a somewhat harsh manner when some sensitivity was required seems to have been the main contributor to the problem.

The internal competitive nature of the Local can be a very positive force on behalf of its membership but it would seem that in this issue it created difficulties which had negative overtones and resulted in dissension where it didn't properly exist.

At this late date I am hesitant about going any further than this but I would recommend in the strongest possible way, that the good intentions of the membership are really not in question and the best interests of the membership would be served if the issue was set aside with a recognition of the lessons to be learned from it.

Local 87 has been one of the most effective and best local unions in CUPE. The qualities which created this difficulty are the same qualities that have made it so effective over the years and I would recommend to you that those qualities be recognized and go forward from this point in time to present the best possible front to the common enemy which is the employer, and be wholly supportive of one another within the Local.

I appreciate that these comments are not what some members would elect to hear. But without a personal acknowledgement of the persons and circumstances which led up to this unfortunate incident it would be divisive for me to extend further on the matter.

Please accept my sincere apologies for the delay in replying and with warmest personal regards, I remain,

Yours fraternally,

(signed)

GRACE HARTMAN  
National President

56. Unfortunately Ms. Hartman's letter was not such as to inspire among the complainants much assurance that their case had been properly heard (nor were the feelings of the petitioners greatly reassured by the fact that they themselves received no direct written reply from Ms. Hartman, the only response from her having been addressed to Ms. Rice as secretary of the local). Their perception, whether rightly or wrongly, is that Ms. Rice was at all times at the heart of a conspiracy to arbitrarily deprive the higher rated employees of the opportunity to negotiate and vote upon an equitable wage settlement. To the extent that Ms. Rice is also a member of the National Executive Board as the representative for Northern Ontario, they are suspicious of any initiatives from the Ottawa office that might involve Ms. Rice's participation. The third paragraph of Ms. Hartman's letter appears to indicate that apart from information obtained from Mr. LeBel the National President was also operating on information which Ms. Rice made available

to her. Further, the President's reference to tension between the "inside" and "outside" components of the local is unfortunate. The issue before her involved a dispute between two segments of the inside component of the local. The inferences which members in the position of the complainants might draw from the letter of the president might raise substantial problems in the realm of internal union politics. Whether, however, they establish a violation of the *Labour Relations Act* is a separate matter to be examined below.

57. Having failed in obtaining redress through their petitions, and with a new round of negotiations scheduled to begin in the fall of 1981, the complainants retained a Thunder Bay lawyer, Mr. Wallace B. Dubinsky, in an effort to obtain for them some form of amendment to the bargaining framework that would ensure some improvement in their future representation. It appears that their initial discussions with Mr. Dubinsky related to the possibility of breaking away from the union in favour of another. A second alternative considered was a separate bargaining unit or a separate local for the technical and para-professional employees. On July 31, 1981 Mr. Dubinsky wrote the following letter to Mr. Hugh Lennon, the union's representative in Thunder Bay:

July 31, 1981

Canadian Union of Public Employees,  
79 North Court Street,  
THUNDER BAY, "P", Ontario.

ATTENTION: Mr. Hugh Lennon

Dear Sir:

We have been consulted by members of your union who are members of Local 87 and comprised primarily of the employees of the Municipality of the City of Thunder Bay working inside City Hall. They have voiced to us their strong complaint as to their representation on the negotiating committee and the fact that they are receiving very little representation in negotiations.

In their first approach they had consulted with us with the idea that they might break away from CUPE and join another union. After some discussion we were able to dissuade them from this course of action and suggested to them as an alternative that they either form a separate bargaining unit into a separate local or attempt to bargain separately through local 87 with the Corporation. Our clients realized the advantages of remaining with CUPE (they are not dissatisfied with the union as such) and have instructed us to attempt to meet with you to determine whether in fact they could form a separate local (similar to local 1803 - Library) or set up a separate professional unit to bargain separately with the Corporation.

We would be pleased to meet with you to assist in ironing out the differences that exist to determine what solution would be best from

the point of view of our clients and of CUPE. Your earliest attention to this matter would be greatly appreciated.

Yours very truly,

(signed)

WALLACE V. DUBINSKY

On the evening of September 1, 1981 Mr. Dubinsky met with Mr. Lennon, Mr. LeBel, Mr. McFarlane and Dr. Mario Hikl, a legal adviser to the national union to discuss a means to resolve the grievance of the complainants. According to Mr. Dubinsky's testimony the discussions in that meeting principally concerned the establishment of a separate local under C.U.P.E., with some consideration of the alternative, proposed by Mr. McFarlane, that the higher rated employees be given some form of guaranteed representation on the union negotiating committee for the then upcoming negotiations. On September 8, 1981 Mr. Dubinsky reported to Mr. Zapior and some 9 others of the complainant group. It appears that Mr. Dubinsky's clients were not eager to pursue the possibility of a separate local within C.U.P.E. Mr. Dubinsky who acts frequently for trade unions, then advised the group that he could not continue to act for them if it was their intention to split up an existing union. The meeting ended with no firm resolution, but shortly thereafter as he perceived the antagonistic course which the complainants were embarked on Mr. Dubinsky withdrew from the matter. Although it is not clear on the evidence when the complainants made their decision, it is fairly clear that in September of 1981 they decided to attempt to break away from C.U.P.E. and Local 87. On September 29, 1981 they established their own union, the Municipal Technicians Association of the City of Thunder Bay. They followed the requisite formalities for the establishment of a constitution, the induction of employees into membership and the election of officers. On December 8, 1981 they filed the application for certification which is consolidated with this complaint which was itself filed on November 19, 1981. As part of that application, they submit that the technical and professional employees have a separate community of interest and, based on the quality of representation they have received, they should be granted a separate bargaining unit.

58. We turn to consider whether the foregoing facts disclose any violations of the Act. We consider firstly whether there has been a violation of section 70. Section 70 provides as follows:

No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

59. Section 70 of the Act prohibits any interference with the rights of individuals under the Act amounting to compulsion by means of intimidation or coercion. Without exhaustively defining the meaning of those terms it appears to the Board that at a minimum they must relate to conduct which, directly or indirectly, deprives an individual of his free choice in the exercise of his rights under the Act. While that might include



acts or threats which are physical or economic, the section is aimed at preventing interference with an individual's rights by some form of pressure or force that removes their ability to choose. (*Tim Reay*, [1982] OLRB Rep. Aug. 1206; *Beatrice Foods (Ontario) Ltd.*, [1982] OLRB Rep. Apr. 519; *Purple Heart Film Corp.*, [1979] OLRB Rep. Sept. 900; *Great Lakes Forest Products*, [1979] OLRB Rep. July 651; *Intermodal Marine Surveys Ltd.*, [1979] OLRB Rep. April 321; *Innovative Wood Products*, [1978] OLRB Rep. 161; *Alex Henry and Son Ltd.*, [1977] OLRB Rep. May 288; *A. Greco*, [1976] OLRB Rep. June 323; *Andrew Warren*, [1976] OLRB Rep. Jan. 963; *Canadian Textile and Chemical Union*, [1971] OLRB Rep. Aug. 469.

60. Assuming, without finding, that the actions of the respondents in the removal from office of the complainants Roy and Zapior and the way the union executive disclosed the City's offer at the following general membership meeting constitute conduct that is arbitrary and in bad faith contrary to section 68 of the Act, we are not satisfied that the same actions could be characterized as intimidation or coercion in contravention of section 70.

61. The Shorter Oxford English Dictionary (Oxford, 1973) provides the following definitions of the words "intimidate" and "coerce":

intimidate—to render timid, inspire with fear; to overawe, cow; ... to force to or deter from some action by threats or violence.

coerce—to constrain or restrain by force, or by authority resting on force...to effect by compulsion.

62. In *Canadian Textile and Chemical Union*, [1971] OLRB Rep. Aug. 469, the complainant, the President of Local 346 of the International Chemical Workers Union alleged that his removal from office amounted to intimidation and coercion within the meaning of what was then section 52 of the *Labour Relations Act*. In that case the evidence disclosed that the Local removed the complainant from office because he signed up employees in his bargaining unit in the certification campaign of a rival union, because he encouraged the rival union's raid and because he "conducted himself in other respects to the detriment of the union". In that case the Board commented, at page 471.

In our view the conduct of the respondents was clearly permissible. The undertaking of a union officer imposes a duty and obligation on the part of the officer to further the interests of his union. He is in a position of responsibility and trust and the union is entitled to expect fidelity from such officer. It is very difficult for [the grievor] whose activities involved him in a direct conflict of interest with his duties and responsibilities as a union officer to now complain that he was removed from office. Such removal does not constitute a violation of any of the provisions of the Act. ...[the grievor] was not intimidated or coerced pursuant to section 52 of the Act...

63. In this case the evidence discloses that by their adherence to an unrealistic 98¢ per hour across the board increase on April 8, 1980 Zapior and Roy clearly departed from the mandate of the general membership established on March 30, 1980. Their

intransigence in that position coupled with Mr. Zapior's open statements of sympathy with the position of the City's negotiators on at least two occasions gave definite grounds for their removal from office by the general membership. They were given the opportunity to attend the special executive meeting and failed to do so when they knew, or reasonably should have known, that the serious split in the committee would be discussed. The membership meeting which removed them from office on April 27, 1980 cannot be described as an exercise in intimidation or coercion. It was conducted with adequate prior notice and reasonable procedural decorum. Those favouring the removal from office of the two committee members were given an opportunity to express their views while Roy and Zapior were given the opportunity to have the final word of rebuttal. The vote was conducted by secret ballot. It cannot be submitted that its result, unfavourable as it was to the complainants, did not represent the freely expressed choice of the majority of the membership in attendance. We see nothing in these facts or in any other part of the evidence to establish that any form of fear or compulsion was brought to bear upon the complainants or anyone else by any of the respondents. There is nothing in the evidence in the instant case to establish conduct by any of the respondents that could fairly be characterized as forcibly interfering with the free exercise of the complainants' rights under the Act, nor is there anything in the evidence to suggest that any reasonable employee in the bargaining unit would be intimidated by what happened in the future exercise of his or her rights. For these reasons the complaint as it relates to the allegation that the respondents have violated section 70 of the Act is dismissed.

64. We turn to consider the more substantial question of whether the respondents have violated the duty of fair representation contained in section 68 of the Act. That section provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

65. The duty of fair representation has both substantive and procedural dimensions. In some cases a union's actions may result in an outcome that is itself arbitrary, discriminatory or in bad faith, even though the procedures by which it creates that result are to all appearances fair and open. The most obvious example of a substantive violation of the duty would be a union voting by a majority of its members to restrict membership or certain rights under a collective agreement to a particular racial group. The fact that it has not been arbitrary or discriminatory in its procedures, and has arrived at its decision by an accepted democratic process involving proper notice, debate and balloting is no answer to a charge that it has nevertheless violated the duty of non-discrimination owed to the minority. That kind of insidious distinction, which for ease of reference may be characterized as substantive discrimination, has been contrary to the duty of fair representation since its earliest judicial expression. (*Steele v. Louisville & N.R.R.*, (1944) 323 U.S. 192)

66. Procedural infringements on the duty of fair representation have more frequently been the basis of complaints under section 68 before this Board (see, generally,

Brown, "The Duty of Fair Representation in Ontario" (1982) 60 Canadian Bar Review 412.) The procedural aspect of the duty requires that decisions adversely affecting the interest of an individual or group of employees be made by a process within the unit that is untainted by ill will, hostility or any other aspect of discrimination, arbitrariness or bad faith. Outcomes which are the fruit of such procedures have consistently been found to be in violation of the duty of fair representation and have given rise to a number of remedial orders under section 89 of the Act. (*Leonard Murphy* [1977] OLRB Rep. Mar. 146; *Great Lakes Forest Product, Ltd.*, [1979] OLRB Rep. July 651; *Toronto East General and Orthopaedic Hospital Inc.* [1980] OLRB Rep. Apr. 555; *Toronto Hydro Electric System*, [1980] OLRB Rep. Oct. 1561)

67. The facts in the instant case require examination under both the substantive and procedural aspects of the duty of fair representation. Counsel for the complainants argues, in effect, that substantive discrimination is established in the erosion, sustained over some ten years, of the wage differential between the complainant technical and professional employees and their clerical counterparts who constitute the majority of the bargaining unit. The first issue, therefore, is whether a violation of the duty of fair representation is made out on the fact that the will of the majority within the union has worked a compression of the wage grid to the economic disadvantage of the complainants. The second issue is whether the process by which the union and its officers adopted the collective agreement for 1980 and 1981, an agreement whose wage formula was arguably more favourable to the clerical employees, amounted to procedures inimical to the duty of fair representation.

68. We consider firstly the issue of substantive discrimination. Has the union violated section 68 of the Act by negotiating collective agreements which have produced compression of the wage grid to the relative disadvantage of the complainants? The jurisprudence provides considerable guidance to the resolution of that question. The cases are replete with passages recognizing that in the collective bargaining system trade offs must be made between the competing interests of different groups of employees. The tension as to which employees will get which slice of the wage and benefits pie negotiated with the employer is intrinsic to any union. Perhaps the best judicial recognition of that reality was made in the often quoted statement of the Supreme Court of the United States in *Ford Motor Co. v. Huffman*, [1953] 345 U.S. 330 at 338:

The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents ... Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

69. The collective bargaining system, predicated as it is on principles of voluntarism and majoritarianism, deems that issues of that kind are best resolved through the internal procedures by which the union determines the will of its members. The fact



that an individual or group is not happy with the choice of the majority does not of itself establish a violation of the duty of fair representation. The principles expressed in *Huffman* were recently applied in *Dufferin Aggregates Ltd.*, [1982] OLRB Rep. Jan. 35. In that case a group of junior truckers lost their work in a quarry as the result of the decision of the majority of their bargaining unit in difficult economic times to amend the collective agreement to substitute layoffs by seniority for a previous work sharing arrangement. In finding that the union's decision did not violate the duty of fair representation the Board made the following observations:

Allocating work and wages, whether in scarcity or in plenty, is the central fact in any scheme of collective bargaining. The struggle between union and management over the division of profits in the form of wage and benefits settlements usually gets the bulk of public attention. The less visible question, however, of which employees will work and how much they will get is often no less important. It may generate as much heat inside the union hall as does the confrontation with the employer outside.

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The fact that a union may be required in bargaining to make a hard decision that has a serious economic impact on individuals, up to and including the loss of their jobs, cannot of itself make that decision unlawful. That kind of decision is, moreover, not unusual. In making collective agreements it is practically impossible for the unions to avoid making decisions that benefit one class of employees at the expense of another. For example when a union opts for more wages rather than better pension provisions it benefits its younger members rather than the older ones. Trade-offs of that kind are the everyday stuff of collective bargaining.

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There is nothing inherently unlawful in a union making a decision that favours a group of employees over another. From the earliest decisions interpreting section 68 of the Act the Board has recognized the need for unions to have the latitude to make decisions that may favour certain employees at the expense of others. As the Board put it in *Ford Motor Co. of Canada Ltd.*, [1973] OLRB Rep. Oct. 519, in applying what was then section 60 of the Act, (at pp. 525-26):

In practical terms the relationship between members of the bargaining unit and the trade union is one of majority control. The relationship is not strictly one of contract between employee members of the union and the union, but rather the relationship is such that the system created more closely resembles the Legislative process than a contractual relationship; see Cox, "Rights Under a Collective Agreement" 69 Harv. L. Rev. 601 (1956).

Section 60 of *The Labour Relations Act* seeks to ensure that individual's rights are not abused by the majority of the bargaining unit; it is an attempt to achieve a balance between the individual interests and the majority interest by recognizing that the exclusive bargaining agent has a duty to consider all the separate interests in the performance of its obligations. The duty has been described as the duty of fair representation. The emphasis is on fairness—it is a duty to act fairly in the interests of all members as well as non-members, craft employees as well as industrial employees. It is not a duty which makes the union the guarantor or insurer for every situation in which an individual employee is aggrieved or adversely affected; rather, the statute attempts to have the union consider the position of all groups and to weigh the competing interests of minorities, individuals and other like groups in arriving at its decision.

70. The Board is satisfied that the foregoing principles correctly point the way to the resolution of the first issue. As members of a large bargaining unit – a unit whose very effectiveness in gaining improvements for its members may well depend on its size – the complainants must accept that their economic interests may to a degree conflict with those of other employees whose views may reflect the will of the majority. As long as the wishes of the majority are effected by means that are honest, open and devoid of ill-will or hostility aimed at the minority, there is no violation of the duty of fair representation.

71. Does the evidence of compression in the wage grid disclose deliberate mistreatment of the employees in the technical and professional groups over the years from 1970 to 1980, or indifference to their concerns? The ten year period canvassed in the evidence was marked by a high rate of inflation, coupled with a retrenchment of public spending. One response to inflation in both the public and the private sector was to graduate wage increases for different groups of employees. Underlying this approach was the recognition that persons at the bottom of the economic scale, with less ability to adjust essential spending needs, were harder hit by inflation. It was therefore not uncommon to give smaller rates of increase to those at the top of the income ladder who could, by adjustment in their spending patterns, better absorb the effects of a rising consumer price index, while directing somewhat higher percentage increases to those at the bottom. The ostensible inequality in applying different rates of wage increases to different personnel was in fact motivated by a desire for a more equitable response to the relative impact of inflation on all of them.

72. What happened to the complainants' wages between 1970 and 1980 is in keeping with that general pattern. Given the effects of inflation it becomes an arguable question to what extent the complainants were relatively worse off during those years than the lower paid employees in the clerical categories. That is not to dismiss the concerns of the complainants, nor to necessarily approve or disapprove of the choices made by the union respecting the allocation of wages. These comments are by way of observing that there is, on the face of the wage treatment of the complainants, nothing that is presumptively oppressive.

73. It is also significant that for virtually the entire period of the contracts surveyed there is no evidence of any notable complaint or opposition from the ranks of the

complainants. Even in the negotiation for the 1980-81 collective agreement the evidence discloses that neither Mr. Roy nor Mr. Zapior specifically raised the issue of the compression of the wage grid when the bargaining committee's initial goals and mandate were being formulated. While Mr. Zapior testified that he joined the negotiating committee with the specific purpose of redressing what he perceived as a wage imbalance in the grid, there is no evidence to support that he had that concern or mission at the outset. He and the others in the committee accepted without objection an initial mandate to obtain an increase of \$1,500 in addition to 6% across the board in a one-year contract. Neither Zapior nor Roy initiated wage compression as an issue. It was in fact initiated by the negotiators for the City in the pattern of wage proposals which they made between December of 1979 and March 25th of 1980. At most there appears to have been a gradual awakening of Zapior and Roy to that issue. They were, of course, free to accept the City's characterization of the problem of wage compression and to alter their own views. The significant point, however, is that neither of them made any outward sign of discontent with the previous wage patterns going into the negotiations. The Board views that as evidence that the wage compression that took place over ten years was not a factor of such importance as to raise spontaneous concern among the complainants when the union was developing its bargaining strategy and goals in late 1979.

74. The evidence does not indicate that there was anything sinister or unusual in the union's position on wages in the years between 1970 and 1980. The choices which the union made on wage allocation were made openly and were defensible given the prevailing economic conditions. On the whole of the evidence the Board cannot find that the complainants were the victims of substantive discrimination nor of arbitrary treatment in the negotiation of their wages to that time. This aspect of the complaint cannot, therefore, succeed.

75. We turn to the issue of procedural fairness. Have the union or any of the officers who are respondents violated the duty of fair representation owed to the complainants in the way the collective agreement for 1980-81 was negotiated and ratified? This requires consideration of the facts surrounding the removal from office of Zapior and Roy, the response of the national executive of the union to their petitions, the restructuring of the negotiating committee and, finally, the presentation of the City's monetary offer to the membership at the general meeting of May 4, 1980.

76. Before dealing with the facts, however, it is helpful to review some general principles to which the Board adheres in the review of union actions under section 68. In this case counsel for the complainant placed considerable emphasis on the fact that in a number of instances the union's actions in the removal from office of Zapior and Roy and the restructuring of the negotiating committee were arguably inconsistent with the letter of the union's by-laws. During the course of the hearing he also attempted to adduce evidence relating to what he maintained was the excessive expenditure of funds by the local, particularly in relation to the sponsoring of delegates to CUPE's national convention in Winnipeg. The Board sustained the objection of counsel for the respondents that that line of inquiry was irrelevant.

77. Where individuals' rights strictly as union members are concerned, there are the avenues of redress under other sections of the Act where it can be established that a specific right has been violated (*Saverio A. Greco*, [1976] OLRB Rep. June 323; *Frank Manoni and Lise Manoni*, [1981] OLRB Rep. Dec. 1775, *The International Association of*



*Bridge, Structural and Ornamental Ironworkers*, [1982] OLRB Rep. Feb. 233). There are, in addition, traditional avenues of redress for the enforcement of union constitutions in the courts.

78. Section 68 of the Act is specifically aimed at the quality of representation of employees by their union in relations with their employer. It was not conceived as a general jurisdiction for this Board to review the fairness of every union procedure or decision that affects individuals as members. The selection of delegates to a union convention or the payment of their expenses would not, without more, disclose a violation of the duty of fair representation under section 68 of the Act. Nor would the fact that a union has departed from the strict provisions of its constitution or by-laws. The departure from a union's constitution by-laws may, however, be relevant in a section 68 complaint. Substantial disregard of a union's constitution or by-laws may be evidence of motive or a pattern of conduct to support a conclusion that an individual or a group of employees have been the victims of arbitrary, discriminatory or bad faith treatment in their representation as employees. To that extent it may be relevant.

79. The evidence establishes that in the removal from office of Zapior and Roy the union did not adhere to any procedure in its by-laws. There is no procedure to be found in the local's by-laws for removing a union officer during tenure. On this point local union president McFarlane testified that there was no prior experience in the local for the removal of an officer, and the executive assumed that a generally fair procedure ratified by the general membership would be an acceptable way to proceed. The national constitution of CUPE does contain a provision for the impeachment by trial of a union officer, but it appears to involve a fairly slow and elaborate procedure. The respondents submit that in the circumstances substantial notice in writing followed by a fairly extensive hearing and appeal procedure were inappropriate. The parties were in a crucial stage of bargaining, with conciliation behind them. The union needed an undivided negotiating team if an acceptable collective agreement was going to be concluded. We find it hard to dispute that in the circumstances of this case recourse to lengthy impeachment proceedings, with the risk that an already protracted negotiation would remain in abeyance indefinitely, was not a reasonable course to follow.

80. On the whole it is difficult to accept that the union or its officers acted arbitrarily in the removal from office of Zapior and Roy simply on the basis that the local's by-laws did not specifically provide a procedure to be followed or that the formal impeachment proceeding in the national constitution was not resorted to. The evidence plainly establishes that whatever the merits of the views espoused by either Roy and Zapior on the one hand or Parker and Rice on the other, there was an intolerable rift in the union's negotiating committee. The membership had plainly chosen the view of Parker and Rice. By their action in nevertheless advancing a demand for 98¢ per hour across the Board Roy and Zapior demonstrated indifference, if not contempt, towards the general membership. At that point, they were openly advancing the position which they saw as necessary to satisfy the interests of the minority to the obvious detriment of the majority given the state of negotiations. On those facts, the Board cannot find fault with the decision of the local union officers, supported by the national's representative, Eileen Okerland, to have their tenure of office reviewed by the general membership.

81. Nor can we see arbitrariness, discrimination or bad faith in the way in which

the two complainants were removed from office. Firstly they were given notice of a special meeting of the executive called for Sunday, April 20, 1980 to deal with the difficulties the committee was having. Given the course of events at that time we cannot accept that they had inadequate notice of what would be discussed. The split in the committee was an open cause of concern and they should reasonably have concluded that it would be discussed. There is, moreover, no evidence that any proposal or motion for their removal had been put forward prior to that meeting. We cannot, therefore, find fault with the notification which Mr. McFarlane gave Zapior by telephone, and which was conveyed through him to Mr. Roy.

82. Even assuming, without finding, that more specific notice should have been given to Roy and Zapior at the level of the executive committee, it appears to the Board that the subsequent procedures followed by the local would have cured any shortcoming. Both Roy and Zapior were given specific notice in writing of the motion which the executive proposed to place before the general membership at the special meeting called for Sunday, April 27, 1980. They knew well in advance that their removal from office would be considered and had every opportunity to muster support for their position among the members and to prepare in any other way to meet the proposal that they be removed. The meeting which considered their removal from office was open and fairly conducted, Roy and Zapior having every opportunity to answer anything that was said against them. Nor can the Board accept their legalistic submission that they were wrongfully treated because the motion of the general membership was only to ask for their resignation and not to replace them if they declined the request to resign. Substance must prevail over form. By passing a motion to request their resignation the union effectively voted non-confidence in Roy and Zapior. Given that it took immediate steps to elect a new committee there could be no doubt what was intended and what was in fact accomplished by the will of the majority.

83. There is little doubt in our mind that the removal of Roy and Zapior was motivated by the concerns of Arlene Parker and Eileen Rice. Ultimately their superior skill in the politics of the local prevailed. Astute manipulation of the political process inside a union does not violate the Act so long as there is no departure from the threefold standard of section 68 in the representation of employees. No violation of that standard is shown in this part of the evidence. On the facts of the instant case the Board is satisfied that the removal from office of Zapior and Roy did not offend the Act.

84. We have greater concern with what followed. On the facts of the case it becomes apparent why the executive board of the local proposed that the negotiating committee - which according to the local's by-laws is regularly comprised of five members including a chairman - was replaced by a four person committee with no chairman. It also becomes clear why the executive proposed that Mr. Kuzik's vote be removed. The compelling inference is that the executive committee was not motivated solely by a desire to resolve the split in the negotiating committee, but that it wanted to structure the committee in a way that would advance the bargaining stance favoured by Ms. Rice and Ms. Parker. Neither of them could act as chairman because they each held another union office. Under the new committee structure they could assume the role of spokesman, as Ms. Rice eventually did.

85. These facts give the Board concern. Once Roy and Zapior were removed from

office it is not clear that the representation of the general membership in bargaining necessitated any further departure from the union's by-laws. It appears, absent any explanation to the contrary by the union, that in re-establishing the bargaining committee the executive declined to follow its own by-law because it wanted to minimize the possibility of the membership electing new committee members who would favour open discussion of the interests of the minority Roy and Zapior had come to represent. The proposed muzzling of Kuzik's vote is obviously consistent with that intention. With a four member committee having no chairman or casting vote and with Kuzik silenced the respondents Parker and Rice knew they could not lose a vote or any issue inside the committee, even if two employees from the technical and professional group were elected to succeed Roy and Zapior. This part of the evidence leads the Board to conclude that the union's executive ignored the local's own by-law in restructuring the committee to eliminate the possibility that employees from the minority group could again gain a majority voice.

86. It is one thing for the wishes of a minority to be overridden by the openly expressed will of the majority, and entirely another to have their wishes suppressed by the deliberate manipulation of a committee's membership contrary to the union's by-laws. The by-laws and constitution of a union, which are essential elements to trade union status under the Act, are the charter by which the employees in a union may know and enforce their rights. In this case the evidence leads the Board to conclude that the by-law was departed from by the executive committee for the express purpose of limiting the access of the complainant group of employees to any meaningful voice in the bargaining committee. We must conclude that the means adopted constitute unfair suppression of the interests of a minority of employees contrary to the Act.

87. These facts also colour subsequent events. The next critical event is the report of the newly structured bargaining committee to the general membership at the meeting of May 4, 1980. At that point the City had made a three part offer to the union, one part of which clearly favoured the technical and professional employees in that it was designed to relieve the effects of past wage compression. The evidence establishes that Mr. Gilles LeBel, the union's national representative who was present when the offers were made, clearly expected that the three offers would be disclosed for the full consideration of the membership. That is revealed in his telephone conversation with Mr. Zapior on May 3, 1980. At that time Mr. LeBel did not hesitate to tell Zapior that a three part offer, with the choice to be put to the employees, had been made by the City. LeBel then told Zapior that he would have to wait for the general meeting for the details, clearly indicating his own expectation that the options would be put to the members for final discussion and selection by them.

88. A union's ability to decide when to disclose an offer to its membership is central to its effectiveness as a bargaining agent. It may decline to take an offer back for a vote of its members until it gets what it sees as an acceptable offer. That is, of course, subject to the option of the employer under section 40 of the Act, which can be exercised only once, to request a supervised vote of the employees on its last offer.

89. If a union has no positive duty to bring an offer back to the membership, it does have a duty of fair and honest disclosure when it does so. A union which falsifies or misrepresents an employer's offer violates its fundamental trust as the agent of the



employees. Deliberate or reckless misrepresentations respecting the terms of an offer are inconsistent with the "good faith and honesty of purpose" inherent in the duty of fair representation. For example, in *Diamond "Z" Association*, [1979] OLRB Rep. Oct. 791 the Board found that a union violated the standards of section 68 when it misrepresented to its members that a wage settlement would be retroactive and subsequently executed a collective agreement, without further notice to them, knowing it would not.

90. There are few reported cases in the U.S. dealing with the misrepresentation of facts in bargaining by a union to the employees it represents. That is not surprising, as it is fair to assume that the fundamental duty of a union to deal honestly with the employees it represents is so established that it seldom gives rise to litigation. In the limited number of cases where it has, the Courts have left no room for doubt: knowing or deliberate misrepresentation by a union in statements made to employees or a failure to disclose critical facts is inconsistent with the duty to represent employees honestly and in good faith. (*Humphrey v. Moore* 55 LRRM 2031 (1964), U.S.S.Ct.); *Anderson v. United Paperworkers International Union* 103 LRRM 2803 (U.S. Dist. Ct. Minn.). In *Trail v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* 93 LRRM 3076 (1976, C.A. 6th Cir.) the Court ruled that a violation of the duty of fair representation would be established if the evidence confirmed allegations that the union deliberately withheld disclosure of contract terms from the employees affected because it had a justifiable fear that they would be voted down.

91. The issue raised in the instant case is different from *Diamond "Z"* and *Trail*. The evidence does not establish that the union or any of the respondents failed to advise the employees of any of the terms of the collective agreement which was ultimately adopted. The narrow question in this case is whether there was a violation of the duty of fair representation in the response of Ms. Rice to the specific question put to her in the union's general membership meeting of May 4, 1980 by Mr. Zapior. Surprised by the fact that only one of the three options put forward by the City in its last offer was included in the written material handed out to the employees for their approval, Mr. Zapior and Mr. Roy specifically asked Ms. Rice whether there had been any other parts or options to the employer's monetary offer. Their question was, of course, based on factual information which they had in good faith received from the union's national representative, Mr. LeBel. On the evidence the response of Ms. Rice can only be characterized as a deliberate attempt to mislead the membership into the belief that there were no other options or alternative offers put forward as part of the City's final proposal. In the result, the complainants Roy and Zapior, as well as all of the employees affected by the wage compression issue, and indeed the entire membership, were deprived of the ability to consider or discuss the two alternative wage offers which had been advanced as part of the City's proposal.

92. The bargaining committee was not bound to present all or any part of the City's offer to the employees. The narrow issue in this case, however, is whether when an employee asks his bargaining agent a specific question as to the terms of any alternative offers the union has an obligation to respond honestly. If the duty to represent employees with candour and honesty means anything, it must require the responsible union officer to answer openly and honestly. The fact that an honest answer might lead to a discussion among the membership and an outcome which the union officer would personally wish to avoid cannot justify a resort to deliberate evasion or falsehood. When Ms. Rice was asked

whether the offer put before the employees was only one of a set of alternative wage proposals put forward by the City her simple obligation to the employee asking the question was to say "yes". If she had done so and were then asked what the alternative offers were she might fairly respond that the committee did not deem it advisable to present the alternative offers. That would have left it to the general membership to then decide whether they wished to pass a motion for the disclosure of the alternative offers and a subsequent discussion and vote upon them. By her evasive and misleading response to Mr. Zapior, Ms. Rice deliberately foreclosed the possibility of the general membership knowing about the alternative offers and prevented the minority of employees who might have benefited by their terms from the opportunity of having an open discussion and vote on their merits.

93. The conduct of Ms. Rice at the meeting of May 4, 1980 cannot be construed as a negligent misstatement or a slip of the tongue. The preceding events surrounding the removal of Zapior and Roy and the unusual restructuring of the bargaining committee clearly lend colour to what transpired at the general meeting and explain her response to Zapior. In the absence of any evidence whatever from Ms. Rice we have ample grounds to draw adverse inferences. The whole of the evidence suggests that from the beginnings of her struggle with Zapior and Roy, Ms. Rice, along with Ms. Parker, was determined to keep the general membership from considering a collective agreement with greater relative wage benefits for the higher rated technical and professional employees. With the assistance of the executive committee Ms. Parker and Ms. Rice succeeded in eliminating any rival view from meaningful discussion in the bargaining committee. Even if some of those steps can be justified as part of the rough and tumble of internal union politics, her statement to the general assembly of employees on May 4, 1980 cannot. By deliberately misleading the employees in the face of a specific question on the existence of two alternative employer offers then outstanding, as spokesman of the bargaining committee Ms. Rice violated the duty of fair representation.

94. There is no doubt that Ms. Rice was motivated by strong feeling. That feeling was in all probability coupled with a suspicion that the question put by Zapior and Roy was fuelled by information given to them by the employer. While the evidence discloses that it was not, previous statements of sympathy by Roy and Zapior for the position of the City and their acrimonious departure from office would have given Ms. Rice grounds to believe otherwise. A suspicion of that kind, however, could not justify a false or misleading statement to the general membership on the content of the employer's offer. While Ms. Rice may not share the views of Roy and Zapior or be sympathetic to the minority of employees that they represented, she and the other members of the bargaining committee owed an equal duty of fair representation to them. When they put a straightforward and important question to her about the content of the employer's offer she was under an obligation to provide an honest and candid reply. Her failure to do so, and the apparent failure of the other members of the committee to correct the misimpression left by her statement constituted a violation of section 68 of the Act. The Board must conclude that their action was a calculated deception the effect of which was to deprive a substantial minority of the employees of the opportunity to know, discuss and possibly vote on a wage proposal which would have been clearly more beneficial to them. The deliberate effect of Ms. Rice's statement was to structure the discussion in the general membership meeting in such a way as to prevent discussion or consideration of the minority's interests.

95. For the foregoing reasons the Board finds that the respondents McFarlane, Welch, Parker and Rice, and through them the respondent Local 89 of the Canadian Union of Public Employees violated section 68 of the Act. They breached the duty of fair representation firstly in that they deliberately infringed the by-laws of the local union in re-establishing the bargain committee. While a departure from a union's by-laws would not of itself disclose a violation of the Act, in this case it does. The respondents side-stepped the by-laws in a calculated attempt to suppress the bargaining interests of a minority of the employees. Secondly they violated the duty of fair representation by a wilful misrepresentation to the employees in response to a specific question about the content of the City's offer to the employees. That action was also calculated to foreclose discussion or consideration of the interests of the minority of employees. The resulting harm to the minority of employees is best left for consideration after the Board has heard the submissions of the parties on the appropriate remedy. In this regard one issue the Board wishes to see addressed is to what extent, if any, the damage to the interests of the minority was diminished by the fact that subsequently the City made known the full content of its alternative offers, the details of which were known to the membership prior to the final ratification vote of May 27, 1980.

96. On a careful review of the facts we are satisfied that the evidence does not disclose any violation of the Act by the respondents Okerlund, LeBel, Hartman or the national of the Canadian Union of Public Employees. It is clear that at all material times Ms. Okerlund and Mr. LeBel were limited to advising Local 87 in its bargaining and could not themselves make or interfere in decisions of the local. It is also clear that Mr. LeBel dealt throughout in good faith with the complainants, both in his attempt to act as an honest broker between the factions during bargaining and in his subsequent investigation and report to Ms. Hartman.

97. The issue investigated by LeBel on behalf of Ms. Hartman related to the removal from office of Roy and Zapior, which we have found not to be in violation of the Act. It does not appear that any specific complaint about the structure of the new bargaining committee or its report to the general membership was put before him at the meeting he chaired as part of his investigation on June 26, 1980. Nor does it seem that the details of those events were disclosed to Ms. Hartman. Absent a more elaborate statement of these facts to the National and its officers by the aggrieved employees, we cannot conclude that they reacted with indifference or reckless disregard to the rights of the complainants. On the contrary while we do not necessarily endorse the advice of Ms. Okerlund, given the limited power of the national and the facts available to it, we are satisfied that its officers did what they reasonably could.

98. The Board is not satisfied that, as counsel for the union submits, the complaint should be dismissed because of delay in its filing. The complaint was filed in November of 1981, approximately one year after the response of Ms. Hartman. The evidence establishes that in the summer of 1981 certain of the complainants took steps through Mr. Dubinsky to attempt a negotiated solution to their bargaining problems. They did not then contemplate a section 89 complaint. When that effort failed, in September of 1981 with the withdrawal of Mr. Dubinsky, the complainants opted to come before the Board. A delay of several months does, however, remain attributable to the complainants. In our view any assessment of compensation in these circumstances, if any should be made, should be subject to the mitigating factor of delay between November of 1980, when Ms.



Hartman gave the national union's final response, and July of 1981 when Mr. Dubinsky was retained.

99. The Board shall reconvene to hear the representations of the parties on the appropriate remedy as well as their submissions on the merits of the application for certification. The Registrar is instructed to list this matter for a continuation of hearing on the earliest available date.

#### **DECISION OF BOARD MEMBER W. R. RUTHERFORD;**

1. I do not disagree with the facts outlined in the decision or with the conclusions reached as a result of an analysis of the facts.

2. However, it is my view that not enough emphasis has been placed on the Role of the Negotiator for the City of Thunder Bay who attempted to influence the negotiations towards their position of decompression of wages with a proposal of greater increases in wages for the minority top four categories of the inside staff, and a lesser increase for the majority.

3. Mr. Zapior, chairman of the negotiating committee for the inside unit, had been active on the union executive for some years and prior to the instant case Zapior had not raised the compression issue with the union.

4. Mr. Antilla, negotiator for Thunder Bay, raised the compression issue with the union, and with the collaboration of Mr. Roy, a new committee member of the inside Committee and Mr. Zapior, chairman of the committee both of whom are in the top four grades of the inside unit, the compression of wages of the top four categories became a major issue.

5. The inside committee consisted of 4 members and one alternate. Zapior, the chairman, proposed and the committee agreed to the alternate having voice and vote in executive sessions of the Committee. With the alternate now in a position to vote on the committee the move towards the City's position of decompression became apparent to the other members of the committee; this led to deep division on the union's bargaining team.

6. The role of Mr. Antilla, negotiator for the City and the apparent collaboration of Mr. Zapior and Mr. Roy with the support of the alternate towards the City's proposals of decompression stampeded the executive into the removal action.

7. The outside unit had completed negotiations and as usual they established a pattern of bargaining in the area for C.U.P.E. During the critical stage of inside negotiations the outside Bargaining Chairman sat as an observer and reported to the executive that in his opinion Mr. Zapior and Mr. Roy were impeding negotiations by proposing a higher monetary demand than was the established pattern of the outside settlement. The observer told the Local CUPE Executive he had the impression that Zapior and Roy were only interested in the City's proposals of higher wage increases to the top four categories.

8. The above facts explain to some degree why the executive in order to negotiate a settlement removed Zapior and Roy from the committee and returned the alternate to the non-voting position. I would have found that the role of the negotiator for the City, Mr. Antilla, with the collaboration of Zapior and Roy attempting to establish the City's decompression proposals were what caused the Executive of the union to remove the members of the negotiating committee. They are authors of their own misfortune. I concur in dismissing the section 70 complaint against the union as it relates to their removal from office.

9. I agree that the standard of section 68 was violated when the bargaining committee, in reporting to the membership the results of negotiations, failed to candidly respond to questions by the membership respecting the alternate proposals of the City. In my view, however, the impact was substantially reduced in that prior to the final ratification vote the City made the full contents of its offer known to all of the employees. I would have dismissed the section 68 complaint of the applicant.

#### **PARTIAL DECISION OF BOARD MEMBER J. A. RONSON;**

1. I disagree with the majority when they hold that the local union only contravened section 68 of the Act by their actions in this case. I would find that the violation of section 68 falls within the wider context of a breach of section 70 of the Act, i.e. the local union sought by intimidation or coercion to compel a dissident minority of members to refrain from exercising their rights under this Act. I am mindful of section 3 which reads:

"Every person is free to join a trade union of his own choice and to participate in its lawful activities".

The right to participate in the collective bargaining process has to be the very bedrock of the *Labour Relations Act*.

2. I agree with the majority that the national union has not violated the Act. In so doing I note that Gilles Lebel advised Eileen Okerlund that Messrs. Zapior and Roy should not be removed from the bargaining committee. Acting on a frolic of her own, Okerlund refused to even communicate that advice to the local union executive, a very telling point when one assesses the motives of the local union.

3. I would summarize the facts as follows:

(a) Over a lengthy period of time a majority of employees in the "lower" classifications made substantial gains in real income while the real income of the minority of employees in the "higher" classification declined. This was a cause of concern to both the minority and the employer during bargaining for the 1980-81 collective agreement;

(b) By due process, three (3) employee representatives of the higher classifications (Zapior, Roy and Kuzik) were elected to the local bargaining committee. Two of them, Zapior and Roy, attempted to

formulate and present proposals which would relieve the compression that had occurred. Their proposals were within the mandate given to the bargaining committee by the local union membership, but in some cases were quite unrealistic given the previous pattern of settlement established by the employer and its "outside" workers. The employer was also trying to relieve the compression by its proposals, but, in the end, it placed a certain amount of money on the table and told the employees to decide how it should be divided;

(c) There was a fundamental philosophical split on the bargaining committee between Zapior and Roy on the one hand, and Parker and Rice on the other. Kuzik attempted to stay in the middle when he could. When Zapior and Roy attempted to get more money for the minority, Parker and Rice replied that "a loaf of bread costs the same for everyone". Every witness for the local union characterized the motives of Zapior and Roy as being personal, and denied any knowledge of disenchantment by the minority until very late in the bargaining. I find that evidence incredible—it must have been quite obvious right from the start that there was a problem;

(d) The matter came to a head when Zapior, Roy and Kuzik out-voted Parker and Rice regarding the content of proposals to be given to the employer. Shortly thereafter Zapior and Roy were ordered to resign from the committee. When they refused they were removed from the committee by procedures that did not follow and in fact contravened the procedures found in the constitutions and by-laws of both the national union and the local union. This resulted in a bargaining committee led by Parker and Rice;

(e) The whole series of events culminated at a membership meeting where the bargaining committee and the local union executive withheld information and deliberately misled the membership about the content of an offer from the employer.

4. In our country we accept and apply the concepts of the rule of law and decisions made by a majority, be it in the public law of the land or in the "private law" created by organizations. This Board does not grant status to a trade union under the Act, until it is satisfied that the union, by its constitution, by-laws and rules, is a viable entity with trade union objectives.

5. In a private organization, such as a trade union, a dissident minority must adhere to and use the internal rules of the organization to achieve an objective. These rules act as both shield and sword to a minority. Having established these rules, the majority must either abide by them or legally change them. To simply ignore them and proceed by majority vote is to set up a tyranny of the majority,—a description which cannot be softened by saying that what was done was for the good of the majority or the good of the organization as a whole. Nor does this Board recognize the dominant motive of good intention as being a legitimate excuse for conduct which is tainted by illegality, be it conduct of an employer or a trade union.



6. For reasons of expediency the local union removed Zapior and Roy from the bargaining committee and misinformed and misled the employees in breach of section 68 of the Act. The object was to silence a dissident minority of employees without due process;—to intimidate or coerce these employees to refrain from exercising their fundamental rights under the Act. It is difficult to conceive a more serious breach of section 70 of the Act by a trade union.

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**2749-82-R Aluminum Brick and Glass Workers International Union, Applicant, v. Trulite Industries Limited, Respondent, v. Group of Employees, Objectors.**

**Certification Where Act Contravened - Discharge for Union Activity - Interference in Trade Unions - Unfair Labour Practice - Captive audience speech threatening job security if union certified - Several union supporters discharged - Union signing up 30 percent before and none after employer's unlawful conduct - Certificate without vote issued**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members W. G. Donelly and B. K. Lee.

*APPEARANCES: P. Cavalluzzo, David I. Bloom, Bram Herlich, Don Clifford, Donald A. Edmondson, Blair Briceland and Phil Pamenter for the applicant; Peter Alexander and A. McInnes for the respondent; Ivan John Stenseth and Todd Whyatt for the objectors.*

## **DECISION OF THE BOARD:**

### **I**

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

### **II**

4. This matter originally came on for a hearing before the Board on April 22, 1983. The applicant was represented by counsel, Peter Alexander and Archie McInnes appeared on behalf of the respondent, and I. J. Stenseth and Todd Whyatt appeared on behalf of a group of employees. It was apparent on April 22nd, however, that the matter would have to be put over for hearing on another day because there were substantial disagreements between the parties on the composition of the bargaining unit, and the status of certain individuals whom the union claimed exercise managerial functions within the meaning of section 1(3)(b) of the Act. Moreover, the union also relied on

certain unfair labour practice allegations which, it asserted, were of such gravity that it should be certified pursuant to section 8 of the Act. Section 8 reads as follows:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

5. In view of these difficulties, the case was rescheduled for hearing on May 5, 1983. At that hearing, as before, the applicant union was represented by counsel, and Peter Alexander appeared on behalf of the respondent. No one appeared on behalf of the objecting employees although Mr. Stenseth and Mr. Whyatt were both served with notice of the hearing. Apart from section 8 to which we have already referred, the applicant union relied upon the following unfair labour practice provisions of the *Labour Relations Act*:

**64.** No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

**66.** No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat or dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a

member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

79.-(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

### III

6. The employer is a manufacturer of insulating glass with plant facilities in Mississauga, Ontario. The company is owned and managed by Peter Alexander and Archie McInnes. It employs between thirty-two and thirty-five "bargaining unit" employees. The union asserts that on March 23, 1982, the respondent convened a "captive audience" meeting at which intimidatory comments were made, and that on March 24, the respondent discharged four key union supporters.

7. Phil Pamenter, Rick Mullen, Don Edmondson, and Blair Briceland (the four employees who were discharged and later reinstated some weeks after the filing of an unfair labour practice complaint) all gave evidence about the abortive union organizing campaign. Their evidence was both credible and substantially uncontradicted.

8. In the third week of March, 1983, there was an active discussion among the employees about the desirability of joining a trade union. There appeared to be widespread support for a union, and, accordingly, Phil Pamenter undertook to contact the applicant. On March 22nd, he and six other interested employees went to the union hall and signed union membership cards. Briceland and Mullen were among those present. At the union hall, Pamenter was given a number of blank membership cards, and it was resolved that he and his colleagues would seek the support of the other individuals who had expressed an interest in joining the union. All of the applicant's witnesses testified that the initial support for the union went well beyond the seven employees who visited its offices on March 22nd.

9. On March 23rd, the respondent's employees were summoned to a rather



unusual meeting held during working hours in the company cafeteria. There had been meetings in the past from time to time to discuss customer complaints and quality control, but according to the employees who gave evidence a meeting on this scale was quite unprecedented. So was the meeting's length, tone and subject matter.

10. McInnes began the meeting by noting that he had heard that there was talk about a trade union in the plant. He told the employees that if a collective bargaining relationship were established it would "kill the company". This phrase was repeated several times. At one point McInnes also suggested that if a trade union "came in" the company would have to shut its doors. With a trade union, he said, everything would be restricted. There would no longer be any overtime opportunities, and the employer's previous "open door" policy would no longer be possible.

11. McInnes outlined the company's financial difficulties in some detail and reminded the employees that, in the circumstances, they were lucky to have a job. He suggested that rather than an outside union, the employees should form their own committee. Such committee could mobilize funds to be put into the company rather than spent unnecessarily on union dues. He told the employees to be patient and that wage increases would be forthcoming at the end of March. When it was suggested from the floor that some employees might be wary of discussing their complaints or concerns with their employer, the employees were advised that they should have nothing to fear, because the company would not, and could not, take reprisals.

12. Towards the end of the meeting, McInnes invited anyone who still supported the union to raise his hand. No one did. Not surprisingly, in the circumstances, even those employees who had signed union cards were disinclined to identify themselves. Pamenter, Mullen, Briceland, and Edmondson all testified that they feared for their jobs - a fear which was not unreasonable given what happened to them the following day.

13. According to Mullen, the speech had a real impact on the employees. Individuals who had indicated an interest in the trade union prior to the March 23rd meeting, were no longer willing to sign membership cards. Edmondson testified that employees were worried about their jobs just as he was. Briceland testified that after the meeting he didn't know who to trust. He was particularly concerned that employees who thought they might be suspected of having trade union sympathies would be prompted to demonstrate their "loyalty" to their employer by identifying the principal union supporters and that therefore, Briceland's own job would be in jeopardy. This, too, was not an unreasonable concern. Peter Alexander admitted that after the meeting certain employees had in fact come to the office to tell the owners who was supporting the union.

14. The following day, March 24th, Pamenter, Mullen, Briceland, and Edmondson were all fired. Mullen was told by Peter Alexander that it was obvious that he was unhappy working for the company, and that if he wanted a trade union there were lots of companies down the road. Alexander told Briceland that he was disappointed that he [Briceland] was not "on the company's side". The separation slips prepared by the respondent for all four employees indicate that the reason for their termination is "causing dissention amongst employees". In his evidence before the Board, Peter Alexander admitted that he knew the four individuals were union supporters and decided to fire them forthwith when he was told that someone had been threatened in connection with the solicitation of support for the union.

15. The application for certification was filed on March 31, 1983. Notice of the application was sent to the employer by registered mail dated April 5, 1983. On or about April 8, 1983, the respondent altered the rates of wages for its employees. The respondent has also instituted a programme whereby its employees can "buy in" to the company through a payroll deduction plan and receive share certificates in return for their financial contribution. This was part of a new more comprehensive employee relations strategy which McInnes and Alexander hoped would be beneficial to both the company and the employees.

16. On the basis of the evidence before it, the Board makes the following findings:

- (a) The respondent's remarks to its employees during the meeting of March 23rd included direct and immediate threats to their job security and continued livelihood should they seek to exercise their statutory right to form or join a trade union. Those remarks constitute a serious breach of sections 64 and 70 of the *Labour Relations Act*.
- (b) The discharge of Pamenter, Mullen, Briceland, and Edmondson was motivated solely by the respondent's belief that they were supporters of the trade union and constitutes a breach of sections 64, 66, and 70 of the Act.

17. The evidence also strongly suggests that there has been a contravention of sections 79 and 64 of the Act, given the timing of the wage increases and the implementation of the stock option/employee participation programme. However, since these alleged contraventions of the Act were not strongly pressed by the applicant (there is no clear evidence on precisely when the respondent received notice of the application), and are unnecessary for the result we have reached in this matter, it is not necessary to reach any firm conclusion about them.

18. We turn then to the application of section 8 of the Act.

#### IV

19. Certification without a vote under section 8 was designed as a deterrent to illegal employer interference in union organizing campaigns, and a device to provide a meaningful remedy in those cases where the employer's interference undermines his employees' statutory rights, and, in addition, precludes the Board from undertaking its usual determination of employee wishes through a representation vote or an assessment of the union's membership evidence. In other words, section 8 is a kind of "second best" solution, to be applied where the employer's misconduct not only frustrates the union's organizing drive, but also impairs the Board's ability to ascertain whether the majority of the employees do or do not wish to be represented by a union. In order for a union to be certified under section 8 of the Act, the Board must be satisfied that:

1. the respondent employer has contravened the Act;
2. the contravention is of such nature that the true wishes of the employees are not likely to be ascertained in a representation vote or otherwise; and

3. that the applicant union has membership support adequate for collective bargaining.

20. There is no doubt that the respondent's conduct in this case involves serious contraventions of the Act even though, to some extent, its actions are understandable, and, in the Board's experience not all that unusual in today's troubled times. Peter Alexander testified that he and his partner were deeply concerned about the prospect of dealing with a union, and like many other small businesses in recent years, they have been experiencing severe financial difficulties. A collective bargaining relationship was regarded as but one more burden which they feared would destroy their business. Alexander was also convinced that support for the union was restricted to a small vocal minority of new employees whose presence had disrupted the "family" atmosphere which he had sought to maintain with the employees since the company was formed in 1975 - hence his decision to fire the "agitators". Indeed, Alexander candidly admits that his actions were improper and an overreaction attributable to the financial pressures which he had been under for some months; and we have no reason to doubt the reality of those pressures. The four discharged employees were eventually reinstated pursuant to a without prejudice settlement of their section 89 complaint.

21. The scenario present in this case is not a new one, and the Board is not unsympathetic to the situation of the small businessman pressed by creditors and high interest rates, and anxious about the very survival of his business. Having no direct experience with collective bargaining and fearing its consequences, such employers sometimes do overreact and interfere with their employees' statutory rights - particularly where, as here, they act precipitately and without professional advice. But our appreciation of the context does not obscure the gravity of what has happened here. In his remarks on March 23rd, Mr. McInnes told the employees that their jobs would be jeopardized if they opted for trade union representation, that the plant would close, that the business would be "killed", and that certain benefits or opportunities then in place (e.g., overtime) would no longer be available. The very next day four employees identified as supporters of the union were summoned before the co-owner of the company and summarily discharged. It is hardly surprising that, thereafter, there was little enthusiasm or support for the union even among persons who had previously expressed considerable interest. The employer has indicated in the most graphic way possible that employees who support the union do so at the risk of their jobs. We do not think this "message" is likely to be forgotten easily.

22. We have found that the respondent has contravened the Act; and if ever there was a case where the true wishes of the employees are not likely to be ascertained by the conventional means now available, this appears to be it. But does the applicant have "membership support adequate for the purposes of collective bargaining"? This phrase was added to section 8 (then section 7(a)) in 1975 in place of the requirement that the union have the support of more than fifty per cent of the employees in the bargaining unit. It is clear, therefore, that the phrase "membership support adequate for collective bargaining" is not simply a reference to majority support. Even more striking is the removal of the reference to a representation vote which appeared in the statutory predecessor of section 8. By doing so, the Legislature appears to have contemplated the possible application of the new section 8, even where the applicant's membership support falls below the minimum level required for entitlement to a representation vote (see *Lorain Products*, [1977] OLRB Rep. Nov. 734). In other words, the section can now apply



to situations where the employer's illegal response is so massive and so early as to prevent a trade union from ever attaining the level of support needed for a representation vote.

23. That is what has happened here. Had it not been for the unlawful interference of the respondent, the applicant might well have garnered at least the thirty-five per cent support necessary for the taking of a pre-hearing representation vote. As it is, the applicant obtained the support of about ten employees on March 22nd – 23rd, but none after the captive audience speech of March 23rd, and the discharges of March 24th. The fact that the union gained the support of about 30% of the potential unit and that a number of employees were interested enough to make their way to the union hall to sign cards lends credence to the evidence of the applicant's witnesses that there was considerable interest in trade union representation, which might have matured had it not been stifled.

24. The competing policy considerations which underlie section 8, are aptly set out by the British Columbia Labour Relations Board in commenting on a similar provision in its own statute. In *International Brotherhood of Boilermakers, Lodge 359 and Forano Limited* (1974) 1 Can. L.R.B.R. 13, the board observed at page 20:

...Certification without a vote...creates a real disincentive to the use of [intimidatory] kinds of tactics. It does so by depriving the offender of the fruits of its unlawful conduct...However, that is just part of the case for this remedy, because the party primarily affected by the certificate is the employees. We can assume that the Legislature did not want to visit the sins of the employer or the union on the innocent employees, who, after all, are supposed to be the beneficiaries of this freedom of choice about collective bargaining. Accordingly, the remedy is to be used where one cannot feasibly determine the true wishes of the employees through the normal means...I think everyone is aware of the risks involved in that kind of certification. In some cases, the employees may have foisted upon them a bargaining representative which they really don't want. Undoubtedly, the remedy must be carefully used...

25. As the above comments indicate, the wishes of the employees are always the Board's primary concern, and the remedy is not meant to be punitive; moreover, where support is not really there, the Board would not be placing the union in an enviable position by granting a certificate. Without the support of the employees the union would have a difficult time negotiating a collective agreement, and it would ultimately face the prospect of a termination application. On the other hand, the Board must not hesitate to consider the provisions of section 8 when it is the employer's own misconduct that impairs the Board's ability to ascertain with more certainty what the wishes of the employees really are. As the British Columbia Board went on to say:

...The Board must not be afraid to use it [the certification remedy] when it appears appropriate. The Legislature conferred it for the very good reason that there is another equally serious risk to employee freedom. The majority in a unit may really want collective bargaining but have been intimidated from choosing it openly. The only way they will get it, is for the Board to certify the union...

26. These policy considerations are clearly reflected in the present application. Some thirty per cent of the employees in the bargaining unit signed membership cards on March 22nd - 23rd and, according to the evidence of the union, a number of others had expressed interest. But the employer's speech on March 23rd and its discharge of four union supporters on March 24th would obviously dissuade any reasonable employee from signifying support for the union lest such support be communicated to the employer and result in the same kind of reprisals visited upon Pamenter, Mullen, Briceland and Edmondson. The obligation of the Board to make this admittedly somewhat speculative assessment about the depth of the union's support only arises because the employer has intentionally destroyed the more reliable and conventional means of ascertaining employee wishes.

27. In our view, the applicant has demonstrated a substantial and workable "core" of support for the union, and, on the evidence before the Board, this "core" must be regarded as a basic minimum of the trade union's support since there were other individuals who expressed interest and who might be moved to support the applicant once the opportunity for a free expression of views has been established. There is, in addition, no evidence in the present case to suggest that the union's campaign was anywhere close to being "spent" at the point when the respondent employer intervened. Accordingly, on the basis of the evidence before it, the Board finds that the respondent has contravened the Act in such manner that the true wishes of its employees are not now likely to be ascertained and that the applicant has membership support adequate for collective bargaining. That the applicant is therefore entitled to be certified pursuant to section 8 of the Act; moreover, the resolution of the dispute concerning the status of Ray Fillen, Julian Shostal and Robert Hannah cannot affect the union's right to certification. Accordingly, the Board, pursuant to section 6(2) of the Act, hereby certifies the applicant in respect of the agreed bargaining unit set out in paragraph 3. A final certificate must await the resolution of the status of the disputed employees.

28. The Board also appoints an officer to enquire into and report to the Board upon the duties and responsibilities of Ray Fillen, Julian Shostal, and Robert Hannah whose employee status remains in dispute.

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**0105-83-R** Local Union 586, International Brotherhood of Electrical Workers, Applicant, v. **Union Electric Supply Co. Limited**, Respondent.

**Certification – Membership Evidence – Application for certification filed in name of local union – Membership evidence in name of International Union with no mention of local number – Receipt portion indicating applicant union’s local number – Membership evidence accepted in circumstances**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members B. L. Armstrong and F. W. Murray.

**APPEARANCES:** *Wm. J. Moore and Thomas K. Moffatt for the applicant; no one appearing for the respondent.*

**DECISION OF THE BOARD;** May 19, 1983

1. This is an application for certification.

• • •

3. The Board finds that the applicant is a trade union within the meaning of section 1(l)(p) of the *Labour Relations Act*.

4. The Board further finds that all office and clerical employees of the respondent in the City of Ottawa, save and except the lighting supervisor, confidential secretary to the general manager, purchasing supervisor, credit manager, accountant, assistant district manager and salesmen, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The membership documents filed by the applicant in support of its applications were in the form of separate applications for membership and receipts. While the application is filed in the name of Local Union 586, International Brotherhood of Electrical Workers, each of the membership applications indicate that the person who has made it is applying for membership in the International Brotherhood of Electrical Workers (“I.B.E.W.”). They contain no reference to Local Union 586. There is a space provided on the card in which to enter the number of the local union but in each case it was blank. The carbon copy of a separate receipt stapled to each membership application revealed the payment of \$2.00 by the person to whom it had been issued and who is purported to have applied to join the I.B.E.W.. Each receipt bears the number 586 in a space following the designation “L.U. No. ...”. Each receipt contains the statement that the \$2.00 was paid for “Application to join Local 586” and the signature of the person to whom it was issued follows immediately below that statement.

6. The Board’s decision in *Bernardin of Canada Limited*, [1975] OLRB Rep. Oct. 737, which deals with an application for certification by a sister local of the applicant, deals with membership evidence similar in nature to that now before the Board. The Board in that case, in refusing to accept the evidence as being evidence of membership in the applicant, commented as follows:



4. At the hearing in this matter the Board raised for representation by the parties the conclusion that should be drawn for purposes of section 7(1) of the Act as a result of the nature of the membership cards filed by the applicant in support of its claim for bargaining rights. The application is filed under the name of "Local 1590, International Brotherhood of Electrical Workers." The membership cards indicate that an applicant for membership is applying "for membership in International Brotherhood of Electrical Workers (AFL-CIO-CLC)." The spaces reserved for insertion of "a local no." were left blank on each of the 37 application for membership cards filed in support of the application. In thirty-two instances it was indicated by a separate document stapled to the application for membership card that the applicant paid a dollar in the way of initiation fees. These receipts show "Local 1590" on their face and are signed by a collector. The issue before the Board is whether the documentary evidence of membership submitted herein indicates that the signatories thereto have expressed a desire to be "members" of the applicant trade union for purposes of the count.

5. The Board has consistently ruled that evidence of membership in the international parent will not be used as evidence of membership in a local thereof. (See; *The Beaver Foundation Ltd.* case OLRB M.R. October [1967] 652; *McDonald's Consolidated Limited* case OLRB M.R. August [1969] 634). The Board has also stated that applicants for certification must be most circumspect in the quality of the evidence of representation filed in support of its claim for bargaining rights. (See; *The Journal Publishing Company of Ottawa, Limited* case OLRB M.R. July [1974] 499 at p501; *Le Droit Ltee* case OLRB M.R. December [1970] 905). As result of the apparent carelessness of the representatives of the applicant in conducting its campaign the Board is placed in the difficult position of discerning on the face of the documentary evidence the intent of the applicant for membership in signing a membership card. We do not know whether it was the applicant Local 1590 or its parent International that was intended to be signified as his "exclusive" bargaining agent. Therefore, as a result we are not satisfied that the applicant Local represents as "members" employees in the appropriate bargaining unit for purposes of section 7(1) of the Act (See; *The J. D. Carrier Shoe Co. Ltd.* case OLRB April [1968] 54; *The Municipality of Metropolitan Toronto* case OLRB M.R. September [1967] 5737).

7. When the Board in the case at hand raised with the applicant the matter of its membership evidence, the applicant advised the Board that it was aware of the Board's decision in *Bernardin, supra*, but argued that its evidence was materially different than the evidence before the Board in that case and left no doubt that the employees were knowingly applying for membership in the applicant. The applicant claimed that the Board had accepted the identical form of membership evidence, containing the same statement on the receipt as quoted in paragraph 5 above and bearing the employee's signatures after the statement, in its application for certification with respect to *Lyle West*

*Electric Limited*, [1978] OLRB Rep. Nov. 999. That decision does not reveal the form of the membership documents tendered, however, so does not assist the Board herein.

8. While the applicant's organizer has been careless in failing to complete, or have completed by the persons applying for membership, the application form so that it would show clearly whether the employee was joining the applicant or the I.B.E.W., we are satisfied from viewing together the application and related receipt that each employee knew that he was signifying the applicant to be his exclusive bargaining agent.

9. The Board also advised the applicant that it would be conducting a preliminary inquiry into the signatures on two sets of membership documents because the signatures thereon appeared to be different than the specimen signatures supplied by the respondent. That inquiry has been made and the Board is satisfied that the documents were signed by the persons for whom they were tendered.

10. Therefore, on the basis of all the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on April 26, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant.

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**1791-82-R** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, Applicant, v. **The Board of Education for the City of Windsor**, Respondent, v. Canadian Union of Public Employees, Intervener.

**Certification - Construction Industry - Whether maintenance or repair work - Whether construction industry work - Whether work in ICI sector**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members S. Cooke and I. Stamp.

**APPEARANCES:** *S. B. D. Wahl and J. Boyle for the applicant; L. P. Kavanaugh, G. W. King, W. T. Mickle, W. Pilotis, R. Dureno, E. Laub and A. Lawrenson for the respondent; Helen O'Regan for the intervener.*

**DECISION OF THE BOARD;** May 18, 1983

1. The applicant has applied for certification with respect to a bargaining unit defined as "all plumbers, pipefitters and steamfitters and all plumber, pipefitter and steamfitter apprentices in the employ of the Respondent: (i) in the Industrial, Commercial and Institutional sector of the Construction Industry in the Province of Ontario; and (ii) in all other sectors of the Construction Industry save and except the

Industrial, Commercial and Institutional sector in the County of Essex (O.L.R.B. geographic area #1) [sic], save and except non-working foremen and persons above the rank of non-working foreman”.

2. The respondent has suggested that the appropriate bargaining unit ought to be described as: “All employees of the Respondent who are engaged in plumbing trade work in the Respondent’s maintenance department, save and except those performing work designated by the Respondent as preventive maintenance and performed by persons employed by the Respondent in the classification of ‘Preventive Maintenance’ referred to in the collective agreement between the Respondent and C.U.P.E. Local 27 and save and except non-working foremen, those above the rank of non-working foreman and persons not regularly employed for more than twenty-four hours per week”.

3. The respondent adopted the position that it was neither an “employer” nor a member of any “employer bargaining agency” as defined in section 117 of the *Labour Relations Act*. The respondent also adopted the position that it was neither a member of any “sector” as defined in section 117(e) nor a member of any “employer bargaining agency” as defined in section 137(1)(d). The respondent also opposed this application under the construction industry provisions of the Act on the grounds that it did not carry on a business in the construction industry, did not employ any plumbers, pipefitters, steamfitters or their apprentices in the industrial, commercial and institutional sector of the construction industry in Ontario or any other sector of the construction industry.

4. The intervener intervened in order to protect its bargaining rights for permanent employees of the respondent who are engaged in caretaking, maintenance and stockroom work. The current collective agreement between the intervener and its Local 27 and the respondent excludes, *inter alia*, temporary employees and union craftsmen employed on the maintenance staff if they continue membership in their own craft unions. The applicant made it clear to the intervener that this application related to the alleged construction industry aspects of the respondent’s operations. At this point the intervener withdrew from this application and did not participate further in this proceeding.

5. The bargaining rights of the applicant may be traced back to a certificate which was issued by the Board on February 27, 1967 (see Board File No. 12733-66-R). The decision therein is in standard form, is without reasons and is noteworthy on two grounds. Firstly, while a craft unit was determined to be appropriate for collective bargaining, the exclusion from the bargaining unit is “foremen and persons above the rank of foreman”. Secondly, the Board did not find that the application was an application for certification within the meaning of section 92 [now section 119] of the Act and did not define the appropriate bargaining unit with reference to a geographic area. The bargaining unit defined by the Board on February 27, 1967, was “all plumbers and plumbers’ apprentices in the employ of the respondent, save and except foremen and persons above the rank of foreman”. The fact that the Board did not make a finding under section 119, did not exclude “non-working foreman and persons above the rank of non-working foreman” (as would be customary in the construction industry), but rather excluded “foremen and persons above the rank of foreman” (as would be customary in most other circumstances) from the bargaining unit and did not define the bargaining unit with respect to a geographic area (in that instance, the Counties of Essex and Kent), all point to the conclusion that the bargaining rights granted on February 27, 1967, were with reference



to non-construction endeavours of the respondent and with no reference to any present or future activities in the construction industry. The Board finds the bargaining rights granted in the certificate dated February 27, 1967, did not extend to and cover bargaining rights in the construction industry.

6. The applicant and the respondent subsequently entered into a collective agreement which was retroactive to January 1, 1966, and which expired on April 30, 1969. Under that collective agreement permanent employees (those hired through the applicant's hiring hall and employed for a year or more) received ninety per cent of the total of the applicable rate plus a welfare allowance. The parties provided a working definition of maintenance work in article 9 of that collective agreement. The applicant and the respondent did not negotiate a new collective agreement. However, in 1971, the applicant and the respondent reached an understanding which has continued since that time. In this understanding, the respondent has paid to the employees who are members of the applicant eighty-five per cent of the rate in the provincial collective agreement together with benefits with respect to welfare, pensions, and supplementary unemployment benefits. These employees also receive all of the fringe benefits received by the respondent's employees who are covered by its collective agreement with the intervener and its Local 27.

7. In March of 1982, the respondent extended invitations to the applicant and five other craft trade unions in the construction industry to negotiate new collective agreements. Subsequently, these five other trade unions concluded separate collective agreements with the respondent. The applicant did not conclude a collective agreement with the respondent. In our opinion, there is no significance to be attributed, within the context of the instant application, to the fact that five trade unions did conclude a collective agreement and one trade union did not conclude a similar collective agreement. The objectives and perceptions of trade unions are frequently different and the alleged characterization by these five other trade unions of the respondent's operations as being within the confines of maintenance work is in no way binding on the conduct of the applicant.

8. The applicant has bargaining rights with respect to the respondent's maintenance operations. In this application the applicant seeks to obtain bargaining rights with respect to the respondent's alleged activities in the construction industry. The evidence establishes that the respondent is engaged on a continuing basis in performing routine maintenance in connection with its fifty-five separate buildings and structures. Towards the end of 1982, the respondent was engaged in a programme to install replacements for obsolete and/or non-functioning radiators and thermostats so that its heating system would perform more economically. It is the intention of the respondent to monitor its new heating system by using a computer with a view to a more efficiently operated system. The programme consists of restoring the functioning of the heating system which had in part ceased to function adequately and which no longer functioned economically. Such work, in our view, is properly characterized as repair work rather than as maintenance work. See *The Master Insulators' Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477. Repair work is included in the definition of construction industry in section 1(1)(f) of the Act.

9. The evidence before the Board establishes that at least two of the seven plumbers employed by the respondent on the date of the filing of this application were

engaged in repair work and, therefore, work in the construction industry. As stated earlier, the applicant already possesses bargaining rights with respect to the employees who are engaged in performing routine maintenance functions for the respondent. The applicant has sufficient membership support to satisfy the requirements for certification with respect to the activities of the respondent which fall under the heading of construction industry whether two or any additional plumbers were performing construction work on the date of the filing of this application.

10. The respondent has argued that it is not an employer in the construction industry and is not operating a business in the construction industry as defined in section 117(c) of the Act. The respondent also argued that it was not engaged in performing work which would fall into a sector as defined in section 117(e) of the Act. There can be no doubt that the principal business of the respondent is that of education. As a necessary part of its principal business of providing services and education, the respondent must necessarily perform a variety of ancillary activities. Such activities or businesses consist of routine maintenance with respect to its buildings, and towards the end of 1982, the modernization and repair of its heating system as referred to previously. In *Tops Marina Motor Hotel* 64 (3) CLLC ¶16,004, the Board held that in order to operate a business in the construction industry, the construction business need not be the principal or only business of the employer of the labour. Similarly, the Board has also held that on occasions a board of education may enter into a business in the construction industry. See: *Kapuskasing Board of Education*, [1972] OLRB Rep. June 583. In addition, the Board has also found that municipalities may on occasions operate businesses in the construction industry. See, for example, *City of Toronto*, [1978] OLRB Rep. Dec. 1145 and *Municipality of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 62. The Board has also held that an employer may simultaneously carry on the businesses of maintenance and construction. See, for example, *M. G. Burk Investments*, Board File No. 0640-76-R, decision dated February 28, 1978. In considering whether a business is being operated, the Board has also held in the *Kapuskasing Board of Education*, *supra*, that it is not necessary that the business be carried on with a view to making a profit. See also, the *Municipality of Metropolitan Toronto*, *supra*. The work performed on the date of the filing of this application is clearly work which would fall within the industrial, commercial and institutional sector of the construction industry. There can be no doubt that work performed on schools falls within the institutional portion of the industrial, commercial and institutional sector. The fact that the respondent has not previously been "a member of an employer bargaining agency" and may not have previously performed work in any sector of the construction industry does not insulate the respondent from the consequences of its activities in the construction industry on the date of the filing of this application.

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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD APRIL 1983

## BARGAINING AGENTS CERTIFIED

### No Vote Conducted

**1930-82-R:** International Ladies' Garment Workers' Union, (Applicant) v. 341857 Ontario Ltd. carrying on business as Don's Sportswear, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foreperson, persons above the rank of foreperson, office and sales staff, mechanics, designers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (60 employees in unit). (*Having regard to the agreement of the parties.*)

**2148-82-R:** Canadian Union of Public Employees, (Applicant) v. Marianhill owned and operated by Grey Sisters of the Immaculate Conception, (Respondent).

Unit #1: "all lay employees of the respondent at Pembroke, Ontario save and except supervisors, persons above the rank of supervisor, registered nurses, graduate nurses, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (65 employees in unit).

Unit #2: "all lay employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period at Pembroke, Ontario, save and except supervisors, persons above the rank of supervisor, registered nurses and graduate nurses." (27 employees in unit).

**2289-82-R:** Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Henderson Machinery Moving and Installation Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working at and out of Mississauga, Ontario, save and except foremen, persons above the rank of foreman, dispatchers, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and employees covered by subsisting collective agreements." (29 employees in unit). (*Having regard to the agreement of the parties.*)

**2316-82-R:** Service Employees International Union, Local 183, AFL, CIO, CLC, (Applicant) v. Lab-Volt (Quebec) Limitee, Quintech Division, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Belleville, Ontario, save and except managers, persons above the rank of manager, office, clerical and technical staff." (18 employees in unit).

**2447-82-R:** International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant) v. Alstate Drywall Systems Limited, (Respondent).

Unit #1: all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipality of Peel and York, the Towns of

Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**2559-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Beta Taxi Ltd., (Respondent).

Unit: "all employees of the respondent in the City of Gloucester, save and except owner-supervisor and persons above the rank of owner-supervisor." (11 employees in unit).

**2612-82-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Upper Canada Post & Beam Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**2613-82-R:** Service Employees Union, Local 183, AFL, CIO, CLC, (Applicant) v. Rickarton Castle Inc. (Respondent).

Unit: "all employees of the respondent in Picton, Ontario, save and except bookkeeper and accountant, general manager and persons above the rank of general manager." (7 employees in unit).

**2616-82-R:** Teamsters Local Union 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Governing Council of The Salvation Army Canada East, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in St. Catharines in its warehousing and store operations save and except foremen, persons above the rank of foreman, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (9 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in St. Catharines in its hostel operation, save and except administrator, and office staff." (5 employees in unit). (*Having regard to the agreement of the parties*).

**2632-82-R:** United Electrical, Radio & Machine Workers of America (UE), (Applicant) v. J.S. Cables Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (9 employees in unit). (*Having regard to the agreement of the parties*).

**2642-82-R:** United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Cochrane Courts System, (Respondent).

Unit #1: "all carpenters' apprentices in the employ of the respondent in the industrial, commercial

and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**2644-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Praetor Enterprises Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

**2659-82-R:** Ontario Public Services Employees Union, (Applicant) v. Cottage Hospital (Uxbridge), (Respondent).

Unit #1: "all paramedical employees of the respondent at Uxbridge, Ontario, save and except department heads, persons above the rank of department head, director of pharmacy, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (5 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all paramedical employees of the respondent at Uxbridge, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except department heads, persons above the rank of department head, director of pharmacy and persons covered by a subsisting collective agreement." (5 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2662-82-R:** International Union of Electrical Radio & Machine Workers (CLC), (Applicant) v. Granada T.V. Rental Limited, (Respondent).

Unit: "all employees of the respondent in the Town of Stoney Creek, save and except Branch Manager, persons above the rank of Branch Manager, office, clerical, legal-collection, and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (2 employees in unit). (*Having regard to the agreement of the parties*).

**2663-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Safeguard Drugs Limited, (Respondent).

Unit: "all employees of the respondent at its retail Drug Stores in the City of London, Ontario, save and except front store managers, persons above the rank of front store manager, graduate and undergraduate pharmacists including pharmacy interns and apprentice pharmacists." (8 employees in unit). (*Having regard to the agreement of the parties*).

**2669-82-R:** Glass, Pottery, Plastics and Allied Workers International Union, (Applicant) v. Cooper Canada Ltd., Roos Division, (Respondent).

Unit: "all employees of the respondent at Kitchener, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for less than 24 hours per week and students employed during the school vacation period." (22 employees in unit).



**2673-82-R:** Retail Clerks Union, Local 1977, Chartered by the United Food and Commercial Workers International Union, CLC, AFL, CIO, (Applicant) v. Zehrs Markets (A Division of Zehrmart Limited), (Respondent).

Unit: "all employees of the respondent in the retail store at Bolton, Ontario, save and except store manager and persons above the rank of store manager." (80 employees in unit). (*Having regard to the agreement of the parties*).

**2700-82-R:** International Ladies' Garment Workers Union, (Applicant) v. Lindzon Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foreperson, persons above the rank of foreperson, office and sales staff, mechanics, designers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (24 employees in unit). (*Having regard to the agreement of the parties*).

**2744-82-R:** Retail Clerks Union, Local 1977, Chartered by the United Food and Commercial Workers International Union, CLC, AFL, CIO, (Applicant) v. Zehrs Markets, A Division of Zehrmart Limited, (Respondent).

Unit: "all employees of the respondent at its retail store at 123 Pioneer Park Drive, Kitchener, save and except the store manager and persons above the rank of store manager." (33 employees in unit).

**2760-82-R:** Service Employees International Union Local 532, AFL, CIO, CIO, CLC, (Applicant) v. St. Elizabeth Home Society, (Hamilton, Ontario), (Respondent).

Unit: "all registered and graduate nurses employed by the respondent in Hamilton, Ontario, save and except Nursing Director and persons above the rank of Nursing Director." (8 employees in unit). (*Having regard to the agreement of the parties*).

**2761-82-R:** Service Employees Union, Local Local 204, affiliated with SEIU, AFL, CIO, CLC, (Applicant) v. 293486 Ontario Limited carrying on business as Cambridge Country Manor, (Respondent).

Unit #1: "all employees of the respondent in Cambridge, Ontario, save and except registered and graduate nurses, paramedical staff, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (10 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent in Cambridge, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered and graduate nurses, paramedical staff, supervisors, persons above the rank of supervisor and office staff." (37 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0019-83-R:** United Food and Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. Tender-Lean Beef Inc., (Respondent).

Unit: "all employees of the respondent in the City of Burlington, save and except traffic manager, forepersons, assistant forepersons, persons above the rank of assistant foreperson, office and sales staff, security staff, those persons regularly employed for not more than twenty-four hours per week and students during the school vacation period." (160 employees in unit). (*Having regard to the agreement of the parties*).

**0021-83-R:** United Steelworkers of America, (Applicant) v. Dynamic Closures Limited, (Respondent).

Unit: "all employees of the respondent company in the united countries of Stormont, Dundas and Glengarry, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed during regularly for not more than twenty-four (24) hours per week and students employed during the school vacation periods." (28 employees in unit).

**0041-83-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.), (Applicant) v. Chrysler Service Contract Company Incorporated, (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario, save and except supervisors, persons above the rank of supervisor, Systems Development Analyst, Secretary to Manager Operations and persons covered by subsisting collective agreements." (12 employees in unit). (*Having regard to the agreement of the parties*).

**0082-83-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Transcona Roofing Co. Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**2527-82-R:** The Canadian Union of Public Employees, (Applicant) v. North Bay Hospital Commission operating the North Bay Civic Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent at North Bay, Ontario, save and except supervisors, persons above the rank of supervisor, Medical Records Librarian, secretaries to, Executive Director, Assistant Executive Director, Director of Personnel, Director of Nursing, Director of Finance, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods and persons covered by subsisting collective agreements." (61 employees in unit). (*Having regard to the agreement of the parties*).

Number of names and persons on list as		
originally prepared by employer		41
Number of persons who cast ballots	38	
Number of ballots marked in favour of applicant		20
Number of ballots marked against applicant		18

### **Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**1913-82-R:** Tremways Drivers Association, (Applicant) v. Tremways (1982) Limited, (Respondent).

Unit: "all dependent contractors engaged as truck drivers and all other employees of the respondent working at or out of Guelph, Ontario, save and except dispatchers, persons above the rank of dispatcher and office and clerical staff." (10 employees in unit).

*Dependent Contractor Truck Drivers*

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of inclusion in a bargaining unit with other employees		7
Number of ballots marked against inclusion in a bargaining unit with other employees		0

*Employee Truck Driver*

Number of names of persons on list as originally prepared by employer		1
Number of persons who cast ballots	1	
Number of ballots marked in favour of inclusion in a bargaining unit with the dependent contractor truck drivers employed by Tremways (1982) Limited		1
Number of ballots marked against inclusion in a bargaining unit with the dependent contractor truck drivers employed by Tremways (1982) Limited		0

**2184-82-R:** United Textile Workers of America, (Applicant) v. Trans Canada Nonwovens Ltd., (Respondent).

Unit: "all employees of the respondent at St. Catharines, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (28 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		24
Number of persons who cast ballots	24	
Number of ballots marked in favour of applicant		14
Number of ballots marked against applicant		10

**2332-82-R:** Service Employees' International Union, Local 532, AFL, CIO, CLC, (Applicant) v. Deem Management Services Ltd., (Respondent).

Unit: "all employees of the respondent at Hamilton, Ontario, regularly employed for not more than 22½ hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman and office staff." (39 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' List		37
Number of persons who cast ballots	20	
Number of persons marked in favour of applicant		19
Number of ballots marked against applicant		0
Ballots segregated and not counted		1

**Applications for Certification Dismissed—No Vote**

**2064-78-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666,



681, 1133, 1304, 1963, 1747, 2480, 2482, 3227, and 3233, (Applicant) v. A. J. Fish & Son Limited, (Respondent).  
( employees in unit).

**0448-82-R; 0451-82-R:** International Union of Operating Engineers, Local 793, (Applicant) v. D. J. Robson Underdrainage Ltd., (Respondent). (10 employees in unit).

**2410-82-R:** The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1007; 1151; 1244; 1410; 1425; 1592; 1916 and 2309, (Applicant) v. Giffin Sheet Metals Limited, (Respondent). (3 employees in unit).

**2620-82-R:** The Canadian Union of Public Employees, (Applicant) v. South Haven Nursing Home, (Respondent) v. Group of Employees, (Objectors). (39 employees in unit).

**2636-82-R:** Aerospace and Electronic Communications Employees' Association (RCA-SPAR), (Applicant) v. RCA Inc., (Respondent). (*Terminated*). (10 employees in unit).

**0009-83-R:** Energy and Chemical Workers Union, (Applicant) v. Roxul Company (A Division of Standard Industries Ltd.), (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener). (32 employees in unit).

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**2216-82-R:** Ontario Public Service Employees Union, (Applicant) v. Toronto General Hospital, (Respondent).

Unit: "all paramedical employees of the Respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, students in training, office and clerical employees, registered nursing assistants, interns and residents, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (285 employees in unit).

Number of names of persons on revised voters' list	285
Number of persons who cast ballots	232
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	69
Number of ballots marked against applicant	146
Ballots segregated and not counted	16

**2440-82-R:** York University Staff Association, (Applicant) v. York University, (Respondent) v. Canadian Union of Public Employees, and its Local 1356, (Intervener #1) v. Canadian Guards Association, (Intervener #2).

Unit: "all parking control officers of the respondent in Metropolitan Toronto save and except supervisors and persons above the rank of supervisor." (12 employees in unit). *Dismissed without counting Ballots*.

### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**0985-82-R:** Service Employees Union, Local 210, Affiliated with the Service Employees International Union (AFL, CIO, CLC), (Applicant) v. University of Windsor, (Respondent).

Unit: "all clerical, secretarial and office employees employed by the respondent at Windsor, Ontario, for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor, persons employed to undertake specific sponsored research projects, full and part-time officers of instruction together with instructors, sessional appointees, teaching assistants and postdoctoral fellows engaged in teaching and/or research, medical doctors and registered nurses, persons employed in the University Library holding the rank of department head or above, administrative assistants and research assistants and systems analysts and persons above such ranks employed in the University libraries, secretary to President, one secretary to each Assistant Vice-President, one secretary to each Assistant Vice-President, secretary to the Director of Personnel Services, secretary to the Manager—Service Records and Benefits, secretary to the Manager—Staff Recruitment, secretary to the Manager—Salary and Wage Administrations secretary to the Budget Supervisor, programmers and systems analysts, secretary to the Data Base Manager, secretary to the secretary of the Board of Governors, secretary to the Registrar, secretary to the Secretary of the Senate, one secretary to each Administrative Director and person above the rank of Administrative Director, Special Assistants to Deans, secretaries to the University Librarian and secretary to the Law Librarian, supervisor of the Switchboard, Assistant Registrars, Chauffeurs, Institutional Research Analyst, and persons covered by subsisting collective agreements, constitutes a unit of employees of the respondent appropriate for collective bargaining." (136 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		245
Number of names of persons on revised voters' list		247
Number of persons who cast ballots	160	
Number of ballots marked in favour of applicant		62
Number of ballots marked against applicant		84
Ballots segregated and not counted		14

**1084-82-R:** Toronto Typographical Union Local 91, (Applicant) v. Tri-Graph Inc. and Tri-One Personnel, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (23 employees in unit).

Number of names of persons on revised voters' list		26
Number of persons who cast ballots	24	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		13
Ballots segregated and not counted		9

**1945-82-R:** United Food and Commercial Workers International Union, (Applicant) v. Primo Foods Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Cottam, Ontario, save and except supervisors/foremen, those above the rank of supervisor/foreman, office and sales staff, agricultural fieldman, seasonal employees, those persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (25 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		17
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		10

**2350-82-R:** Energy and Chemical Workers Union, CLC, (Applicant) v. Westroc Industries Limited (Mississauga), (Respondent) v. United Cement Lime Gypsum and Allied Workers International Union AFL, CIO, CLC, (Intervener).

Unit: "all employees at its Gypsum Plant and warehouse in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, and office staff." (76 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		57
Number of persons who cast ballots	55	
Number of ballots marked in favour of applicant		19
Number of ballots marked in favour of intervener		36

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**2374-82-R:** Teamsters Local Union 419, (Applicant) v. Beaver Lumber Company Limited, (Respondent).

**2602-82-R:** Laundry & Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Kingston Road Planning Mills Ltd., (Respondent).

**2603-82-R:** Laundry & Linen Drivers and Industrial Workers Union Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Buchman & Son Lumber Co. Ltd, (Respondent).

**2759-82-R:** Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Haileybury, (Respondent).

**2762-82-R:** Hotel Employees and Restaurant Employees Union, Local 75, of the Hotel Employees and Restaurant Employees International Union, AFL, CIO, CLC, (Applicant) v. Ramada Renaissance Hotel, (Respondent).

**0067-83-R:** Kitchener Local 357 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, (Applicant) v. Premier Operating Corporation Limited, (Respondent).

**0129-83-R:** International Union of Operating Engineers, Local 793, H. J. McFarland Construction Co. Ltd., (Respondent).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**1620-82-R:** Graphic Arts International Union, (Applicant) v. Total Marketing Incorporated, (Respondent). (*Dismissed*).

**1876-82-R:** United Steelworkers of America, (Applicant) v. I. W. & S. Ferrous Limited, I. Waxman & Sons Limited and I. W. & S. Services Limited, c.o.b. as I. Waxman & Company, (Respondent) v. Lake Ontario Steel, (Intervener). (*Dismissed*).

**1926-82-R:** London and District Services Workers' Union, Local 220, AFL, CIO, CLC, (Applicant) v. Versa-Care Limited and 517800 Ontario Limited, (Respondent). v. Price Waterhouse Limited, (Intervener #1) v. The Maritime Life Assurance Company, (Intervener #2). (*Withdrawn*).



**2375-82-R:** Teamsters Local Union 419, (Applicant) v. Seaway/Midwest Ltd. and Beaver Lumber Company Limited, (Respondent). *(Withdrawn)*.

**2484-82-R:** Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant) v. Giordano Sand and Gravel Limited (A Division of T.R.T. Industries Ltd.); Vicdom Sand & Gravel: TRT Industries Limited; and Kilmer Van Nostrand Co. Limited, (Respondents). *(Withdrawn)*.

**SALE OF A BUSINESS**

**2483-82-R:** Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant) v. Vicdom Sand & Gravel (Ontario) Limited and Giordano Sand and Gravel Limited (A Division of TRT Industries Ltd.), (Respondent). *(Withdrawn)*.

**2574-82-R:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Dewar Insulation Inc. and Karma Construction Supplies Limited, (Respondent). v. Christian Labour Association of Canada, (Intervener). *(Withdrawn)*.

**APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS**

**0875-82-R:** Cornelius Zondag; (Applicant) v. Labourers' International Union of North America, Local 1081, (Respondent) v. Thomas Construction, (Galt) Limited, (Intervener). ( employees in unit). *(Dismissed)*.

**1809-82-R:** Ena June Coles, Joanne Howard, Ada Zimmerling, (Applicants) v. Health, Office & Industrial Union, Local 206, (chartered by the United Food and Commercial Workers International Union, (Respondent) v. W. Frank Real Estate Limited, (Intervener).

Unit: "all the employees of the intervener in Oshawa, Ontario, save and except the Head Bookkeeper, persons above the rank of Head Bookkeeper, the confidential secretary to the President, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (4 employees in unit). *(Granted)*.

Number of names of persons on list as		
originally prepared by employer		4
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		3

**2153-82-R:** Harry M. Dixon, (Applicant) v. Teamsters Local Union No. 879, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, (Respondent) v. Vallance Brown & Co. Limited, (Intervener).

Unit: "all employees working at St. Catharines, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (7 employees in unit). *(Granted)*.

Number of persons on list as		
originally prepared by employer		7
Number of persons who cast ballots	6	

Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	5

**2328-82-R:** Laura Smyth and others, (Applicants) v. Hotel Restaurant & Cafeteria Employees Union, Local 75, (Respondent) v. The Royal Canadian Yacht Club, (Intervener).

Unit: "all employees of the Club employed in the Food and Beverage Service Department in the Municipality of Metropolitan Toronto, save and except Steward, Assistant Restaurant Manager, Restaurant Manager, Executive Chef, Food and Beverage Manager, persons above the rank of Food and Beverage Manager and Office Staff." (20 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		20
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant		6
Number of ballots marked against respondent		7

**2408-82-R:** Stanley Bullock, Eddie Sit, Dalton Walkes and Mu-En Wang, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent) v. York Condominium Corporation No. 510, (Intervener).

Unit: "all maintenance employees employed by the intervener at it condominium at 55/65 Harbour Square, Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (4 employees in unit). (*Granted*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

**0148-83-U:** Ontario and King Limited, (Applicant) v. London Building and Construction Trades Council; International Union of Operating Engineers, Local 793; Bricklayers, Masons and Plasterers International Union of America, Local 5; Labourers International Union of North America, Local 5; Labourers International Union of North America, Local 1059; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 141; Ronald Walsh; George King; Bjarni Andersen; Manual Dos Reis and E.H. Weingarden, (Respondent). (*Withdrawn*).

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**0427-82-U:** Thomas S. Latto, (Complainant) v. Joint Council of Teamsters No. 52, (Respondent). (*Dismissed*).

**0668-82-U:** The United Brotherhood of Carpenters and Joiners of America Employer Bargaining Agency, (Complainant) v. Local Union 675 of the United Brotherhood of Carpenters and Joiners of America and The Interior Systems Contractors' Association of Ontario, (Respondent). (*Granted*).

**0988-82-U:** Ontario Nurses' Association, Jean Berger and Carol Lindsay, (Complainant) v. Grey Owen Sound Joint Homes for the Aged (Grey-Owen Lodge), (Respondent). (*Dismissed*).

**1307-82-U:** Food and Service Workers of Canada, (Complainant) v. Penwest Development Corporation Limited (carrying on business as the Bond Place Hotel), (Respondent). (*Withdrawn*).

**1395-82-U:** Amalgamated Clothing and Textile Workers Union, (Complainant) v. Sunshine T-Shirts Inc., (Respondent). (*Granted*).

**1530-82-U:** Kazimir Cigan, (Complainant) v. International Union, United Automobile Aerospace and Agricultural Workers of America, Local 444 and Chrysler Canada Ltd., Windsor, (Respondent). (*Dismissed*).

**1698-82-U:** Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Complainant) v. Ramada-Renaissance Hotel—Scarborough, (Respondent). (*Withdrawn*).

**1717-82-U:** J. Lewis Humphreys, (Complainant) v. Service Employees Union Local 204, AFL, CIO, CLC, (Respondent). (*Dismissed*).

**1727-82-U:** International Association of Machinists and Aerospace Workers, (Complainant) v. Treco Machine & Tool Ltd., (Respondent). (*Dismissed*).

**1747-82-U:** David Rothschild, George Crook and Group of Employees, (Complainant) v. Southern Ontario Newspaper Guild, (Respondent). (*Withdrawn*).

**1792-82-U:** The Canadian Union of Public Employees, Local 1474, (Complainant) v. The Doctor's Hospital, (Respondent). (*Dismissed*).

**1793-82-U:** Christian Labour Association of Canada. (Complainant) v. Peter Nursing Home Limited, carrying on business as Heritage Manor Rest Home, and Marian Peter, (Respondents). (*Dismissed*).

**1807-82-U:** Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Alltour Marketing Support Services Ltd., (Respondent). (*Withdrawn*).

**1832-82-U:** United Steelworkers of America and its Locals 5875 and 5857, (Complainant) v. Port Colborne Quarries Limited and Ramey's Bend Stone Dock, (Respondents). (*Withdrawn*).

**2472-82-U:** Ontario Public Service Employees Union, (Complainant) v. Toronto General Hospital, (Respondent). (*Dismissed*).

**2512-82-U:** Franco Bartelli, (Complainant) v. United Steelworkers of America District 6, (Respondent) v. Certified Brakes, (Intervener). (*Dismissed*).

**2523-82-U:** Teamsters Local Union No 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Inter City Welding Supplies Co. Ltd., (Respondent). (*Withdrawn*).

**2524-82-U:** Frederick Carl Vincent, (Complainant) v. Walker Exhausts and United Steelworkers of America, Local 2894, (Respondent). (*Dismissed*).

**2533-82-U:** William C. Brown, (Complainant) v. Phil Bennett, Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*).

**2545-82-U:** John A. Fee, (Complainant) v. Phil Bennett, Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*).

**2547-82-U:** Laurie Thompson, (Complainant) v. Phil Bennett, Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*).

**2571-82-U:** John Oram, (Complainant) v. Phil Bennett, Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*).



**2582-82-U; 2583-82-U:** Canadian Union of Operating Engineers and General Workers, (Complainant) v. Olympia & York Development Limited, (Respondent). *(Withdrawn)*.

**2587-82-U:** Peter George, (Complainant) v. Babcock & Wilcox Int., Ltd., and United Steelworkers of America Local Union 2859, (Respondent). *(Withdrawn)*.

**2595-82-U:** Stuart Ayres, (Complainant) v. Phil Bennett, Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). *(Withdrawn)*.

**2618-82-U:** Office and Professional Employees International Union, Local 343 AFL, CIO, CLC, (Complainant) v. The International Brotherhood of Boilermakers, Training and Apprenticeship Programme, (Respondent). *(Withdrawn)*.

**2619-82-U:** Office & Professional Employees International Union, Local 343, (Complainant) v. The Ontario Federation of Labour, (Respondent). *(Withdrawn)*.

**2626-82-U:** United Steelworkers of America, (Complainant) v. Donlee Nuclear, Division of Donlee Manufacturing Industries Limited, (Respondent). *(Withdrawn)*.

**2633-82-U:** Malcolm Hyde, (Complainant) v. Behlen-Wickes Company Limited (c.o.b. as Behlen-Wickes Building Systems), and the International Union Steel Workers of America, and its Local No. 5536, (Respondent). *(Withdrawn)*.

**2637-82-U:** Robert J. McDonald, (Complainant) v. Consumers Distributing Company Limited, (Respondent). *(Withdrawn)*.

**2641-82-U:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Complainant) v. 414594 Ontario Limited carrying on business as Thrifty Donut Shop, (Respondent). *(Withdrawn)*.

**2647-82-U:** Labourers' International Union of North America, Local 183, v. Kilderkin Investments Ltd., (Respondent). *(Withdrawn)*.

**2664-82-U:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Complainant) v. Shirley Leishman Books Ltd., (Respondent). *(Withdrawn)*.

**2665-82-U:** Gordon A. Chisholm, (Complainant) v. Local 496, United Garment Workers of America, (Respondent). *(Withdrawn)*.

**2677-82-U:** International Woodworkers of America, (Complainant) v. Laurentian Woods Inc., (Respondent). *(Withdrawn)*.

**2686-82-U:** Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Ironworkers, (Complainant) v. Empco-Fab Ltd., (Respondent). *(Withdrawn)*.

**2689-82-U:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Complainant) v. Dowling Motor Hotel, (Respondent). *(Withdrawn)*.

**2696-82-U:** Patricia Thompson, (Complainant) v. CUPE Local 167, (Respondent). *(Withdrawn)*.

**2703-82-U:** Bernard C. Trepanier, (Complainant) v. International Union of Operating Engineers Local 793 B, (Respondent). *(Withdrawn)*.

**2706-82-U:** Ontario Nurses' Association, (Complainant) v. St. Magdalene Nursing Home Limited, (Respondent). *(Withdrawn)*.

**2707-82-U:** Ivan J. Wood, (Complainant) v. Retail, Commercial & Industrial Union, Local 206, (Respondent). *(Withdrawn)*.

**2722-82-U:** Kristine (Kris) Owen, (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, (Respondent). *(Withdrawn)*.

**2728-82-U:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Complainant) v. Woolco Woolworth Distribution Centres, (Respondent). *(Withdrawn)*.

**2747-82-U:** Tom Norton and The Professional Clerical Workers of Canada, (Complainant) v. Canadian Union of Operating Engineers and General Workers and its Local 111 et al, (Respondent). *(Withdrawn)*.

**2748-82-U:** Aluminum Brick & Glass Workers International Union, (Complainant) v. Trulite Industries Limited, (Respondent). *(Withdrawn)*.

**2750-82-U:** Erwin Fisher, (Complainant) v. Blue Line Taxi Co. Ltd. & Joseph Cramer, (Respondent). *(Withdrawn)*.

**2753-82-U:** Renee Guerin, Alexis Lessard, Micheline Larocque, Denis Myre, Marie Belanger, Joyce Butler, Eunice Dorosz, Nancy Cross, Sharon Auger, Renee-Lise Menard, Louise Whetstone, Liette Proulx, Diane Laflamme, Nettie Allen, Barbara Altimas, Hugette Fournier, Jocelyn Thistlethwaite and Marie Therese Fraser, (Complainants) v. Canadian Union of Public Employees, Local 1967, Canadian Union of Public Employees, Local 2474, and The Hawkesbury & District General Hospital, (Respondents). *(Withdrawn)*.

**2771-82-U; 2772-82-U:** Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa, (Complainant) v. Murray Macy and The Mill Restaurant, (Respondent). *(Withdrawn)*.

**2773-82-U:** Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, (Complainant) v. Ward Kendall & The Mill Restaurant, (Respondent). *(Withdrawn)*.

**2774-82-U; 2775-82-U:** Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa, (Complainant) v. Murray Macy and The Mill Restaurant, (Respondent). *(Withdrawn)*.

**0001-83-U:** Peter George, (Complainant) v. Babcock & Wilcox International Ltd., United Steelworkers of America, Local 2859, (Respondent). *(Withdrawn)*.

**0003-83-U:** Thomas Hay and Petitioners, (Complainant) v. The Grievance Committee of Local 8782, U.S.W.A., (Respondent). *(Withdrawn)*.

**0018-83-U:** United Food and Commercial Workers International Union, AFL, CIO, CLC, (Complainant) v. Palett A Meats; Tender Lean Beef Limited, (Respondent). *(Withdrawn)*.

**0028-83-U; 0029-83-U; 0030-83-U:** Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa, (Complainant) v. Murray Macy and The Mill Restaurant, (Respondent). *(Withdrawn)*.

**0044-83-U:** Peter George, (Complainant) v. Babcock & Wilcox Int. Ltd., United Steelworkers of America, Local 3859, (Respondent). *(Withdrawn)*.

**0045-83-U:** Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa, (Complainant) v. Murray Macy and The Mill Restaurant, (Respondent). *(Withdrawn)*.

**0074-83-U:** Clayton William Emery, (Complainant) v. John DiNardo, Business Agent for United Food and Commercial Workers Union, (Respondent). *(Withdrawn)*.

**0086-83-U:** Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa, (Complainant) v. Murray Macy and The Mill Restaurant, (Respondent). *(Withdrawn)*.

**0094-83-U:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Complainant) v. Canadian Tire Associate Store J. D. Alexander Company Limited, (Respondent). *(Withdrawn)*.

**0096-83-U:** Labourers' International Union of North America, Local 183, (Complainant) v. York Condominium Corporation No. 365, (Respondent). *(Withdrawn)*.

**0103-83-U:** James W. Davis, (Complainant) v. R. Barolotti, F. Garvan, (Respondent). *(Withdrawn)*.

**0110-83-U:** Peter George, (Complainant) v. Babcock & Wilcox International Ltd. United Steelworkers Of America Union Local 3859, (Respondents). *(Withdrawn)*.

**0153-83-U:** Anne Lloyd, Jean Ryan, (Complainant) v. K Mart Canada Limited, (Respondent). *(Withdrawn)*.

**0154-83-U:** Anne Lloyd, Jean Ryal, (Complainant) v. Service Employees Union Local 204, (Respondent). *(Withdrawn)*.

## APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

**2420-82-M:** The Textile Rental Institute of Ontario, (Employers' Organization) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Trade Union). *(Granted)*.

**2622-82-M:** Dominion Linen Supply Limited, (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Trade Union). *(Granted)*.

**2508-82-M:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., and its Local 240, U.A.W., (Trade Union) v. Sheller-Globe of Canada Limited, (Employer). *(Granted)*.

**2624-82-M:** Rockwell International of Canada Ltd. (Employer) v. International Union United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) and its Local 35, (Trade Union). *(Granted)*.

## JURISDICTIONAL DISPUTES

**2378-82-JD:** The United Association, Local Union 800, (Complainant) v. Le May Construction Ltee., (Respondent). *(Withdrawn)*.

**2575-82-JD:** Camco Inc., (Complainant) v. United Steelworkers of America on behalf of its Local 3129 and on behalf of Office Local 7921, United Electrical, Radio and Machine Workers of America, Local 550, United Electrical, Radio and Machine Workers' of America and its Local 555 and The Draftsmen's Association of Ontario, Local 164, K.F.P.T.E, AFL, CIO, CLC. (Respondents). *(Withdrawn)*.



**2704-82-JD:** The Ontario Provincial, United Brotherhood of Carpenters and Joiners of America, and Local 249 Kingston, Ontario, (Complainant) v. E. S. Fox Ltd., (Respondent). (*Withdrawn*).

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**0806-82-M:** Kingston General Hospital, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Granted*).

**2700-82-M:** McFarland (H.J.) Nursing Home, (Employer) v. Service Employees International Union, Local 183, (Trade Union). (*Terminated*).

**2681-82-M:** Customs Excise Union Douanes Accise, (Applicant) v. OPEIU, Local 225, (Respondent). (*Withdrawn*).

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**1488-82-OH:** Donald Redmond, International Union of Operating Engineers, Local 793, (Complainant) v. Pitt's Engineering Construction Ltd., (Respondent). (*Withdrawn*).

**2346-82-OH:** Robert J. MacDonald, (Complainant) v. Louis T. Maalouf and John Gray of Consumers Distributing Company Limited, (Respondent). (*Withdrawn*).

**0089-83-OH:** Todd Bradley Lindstrom, (Complainant) v. 500139 Ontario Inc. operating as The Potato Centre, (Respondent). (*Withdrawn*).

## CONSTRUCTION INDUSTRY GRIEVANCES

**0678-81-M:** National Elevator and Escalator Association, (Applicant) v. International Union of Elevator Constructor, Local 96, (Respondent). (*Granted*).

**1674-81-M:** United Brotherhood of Carpenters & Joiners of America Local 18, (Applicant) v. James Kemp Construction, (Respondent). (*Withdrawn*).

**0018-82-M:** The Ontario Erectors Association, Ralph M. Moore Industrial Installations Limited and Dominion Bridge Company Limited, (Applicants) v. International Association of Bridge Structural and Ornamental Ironworkers Local 786, International Association of Bridge Structural and Ornamental Ironworkers, the Ironworkers District Council of Ontario, those persons listed on Schedule A and V. Boulard, (Respondent). (*Granted*).

**0035-82-M:** Labourers' International Union of North America, Local 1081, (Applicant) v. Thomas Construction (Galt) Limited, (Respondent). (*Granted*).

**0150-82-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. A. J. Fish and Son Limited, (Respondent). (*Dismissed*).

**0220-82-M:** International Association of Bridge, Structural and Ornamental Ironworkers Local 786, (Applicant) v. Ralph M. Moore Industrial Installations Limited, (Respondent). (*Dismissed*).

**1014-82-M:** Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Eastern Construction Co. Ltd., (Respondent). (*Withdrawn*).

**1076-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Eastern Constructon Co. Ltd., (Respondent). *(Withdrawn)*.

**2178-82-M:** Labourers' International Union of North America, Local 493, (Applicant) v. Kona Builders Limited, (Respondent). *(Withdrawn)*.

**2344-82-M 2345-82-M:** United Brotherhood of Carpenters and Joiners of America, (Applicant) v. K. A. Mace Limited, (Respondent). *(Granted)*.

**2485-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. S.E.S. Construction Incorporated, (Respondent). *(Withdrawn)*.

**2501-82-M:** The Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. The Islander-Westland Group, (Respondent). *(Terminated)*.

**2617-82-M:** Resilient Floor Workers Local Union 2965, (Applicant) v. Perfection Rug Co. Ltd., (Respondent). *(Granted)*.

**2627-82-M:** Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Suss Woodcraft Ltd., (Respondent). *(Granted)*.

**2629-82-M:** Labourers' International Union of North America Local 183, (Applicant) v. Prime Con Construction, (Respondent). *(Granted)*.

**2638-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. Coldmatic Refrigeration Company, (Respondent). *(Withdrawn)*.

**2651-82-M:** Labourers' International Union of North America, Local 247, (Applicant) v. Taggart Construction, (Respondent). *(Granted)*.

**2666-82-M:** Labourers' International Union of North America Local 183, (Applicant) v. Burlington Fence Ltd., (Division of Peel Fence Systems Inc.), (Respondent). *(Withdrawn)*.

**2667-82-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Brentmuir Investments Limited, (Respondent). *(Withdrawn)*.

**2668-82-M:** Labourers' International Union of North America, Local 183, (Applicant) v. D.L.L. Forming Ltd., (Respondent). *(Withdrawn)*.

**2672-82-M:** Labourers' International Union of North America, Local 1089, (Applicant) v. Triple-M-Services, (Respondent). *(Dismissed)*.

**2679-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Cooper's Crane Rental (1982) Limited, (Respondent). *(Dismissed)*.

**2680-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. K. & F. Store Fixtures Limited, (Respondent). *(Withdrawn)*.

**2690-82-M:** Labourers' International Union of North America, Local 183, (Applicant) v. George Robson Construction Limited, (Respondent). *(Withdrawn)*.

**2692-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. V. K. Mason Construction Limited, (Respondent). *(Withdrawn)*.

**2693-82-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Ontario Ltd. #403567, (Respondent). (*Withdrawn*).

**2694-82-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Lednier Construction Co. Ltd., (Respondent). (*Withdrawn*).

**2710-82-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Dewar Insulations Inc. and Karma Construction Supplies Limited, (Respondent). (*Withdrawn*).

**2712-82-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Rindfleisch Contracting Limited, (Respondent). (*Granted*).

**2714-82-M:** The Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Dominion Stores Limited and Min-A-Mart Limited, (Respondent). (*Dismissed*).

**2716-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Nadrofsky Corporation, (Respondent). (*Withdrawn*).

**2727-82-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Kalabria General Contracting Ltd., (Respondent). (*Withdrawn*).

**2731-82-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Ritchie Arctic Ltd., (Respondent). (*Withdrawn*).

**2732-82-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. World Stress Corp. Ltd., (Respondent). (*Withdrawn*).

**2733-82-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Iremo Corporation Ltd., (Respondent). (*Withdrawn*).

**2764-82-M:** The Built-Up Roofers', Damp and Waterproofers' Section of the Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association, Local Union 504, (Applicants) v. Continental Roofing Limited, (Respondent). (*Granted*).

**2765-82-M:** The Built-Up Roofers', Damp and Waterproofers' Section of the Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association, Local Union 504, (Applicants) v. Sudbury Roofing Limited, (Respondent). (*Granted*).

**0036-83-M:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, (Applicant) v. M and M Steel Erectors, (Respondent). (*Withdrawn*).

**0058-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Oshawa Paving Limited, (Respondent). (*Granted*).

**0071-82-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Coolmur Properties Limited, (Respondent). (*Granted*).

**0076-82-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Climb Formwork, (Respondent). (*Granted*).



**0090-82-M:** Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Cara Drywall Services Ltd., (Respondent). (*Withdrawn*).

**0091-82-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Woodbridge Drywall (1982) Limited, (Respondent). (*Withdrawn*).

**0098-82-M:** Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and Edouard Cleroux, (Applicant) v. C'mille's Plumbing and Heating Limited, (Respondent). (*Withdrawn*).

**0111-82-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Climb Formwork, (Respondent). (*Granted*).

**0130-82-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Lochlands Limited carrying on business and Maco Construction, (Respondent). (*Withdrawn*).

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**0197-81-U:** Stanley Dwyer, (Complainant) v. United Automobile, Aerospace & Agricultural Implement Workers of America U.A.W.—International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W. Locak 1285, (Respondent). v. Chrysler Canada Limited, (Intervener). (*Dismissed*).

**2524-81-R:** Toronto-Central Ontario Building and Constructon Trades Council (formerly known as The Building and Construction Trades Council of Toronto and Vicinity) on its own behalf and on behalf of its affiliate, The International Brotherhood of Painters and Allied Trades District Council #46, (Applicant) v. M. J. Guthrie Construction Limited, Rosedale Construction, (Respondent). (*Denied*).

**0144-82-M:** The Toronto-Central Ontario Building and Construction Trades Council (formerly known as the Toronto Building and Construction Trades Council) on its own behalf and on behalf of its affiliates (see Apendix "A"), (Applicant) v. J. J. Guthrie Construction Limited, (Respondent). (*Denied*).

**0284-82-M:** United Brotherhood of Carpenters and Joiners of America Local Union 1669, (Applicant) v. Viano Sarkka Construction (Curtiss Hawk), (Respondent) (*Denied*).

**1845-82-R:** Alexandra Eadie, (Applicant) v. Canadian Union of Public Employees, (Respondent). v. The Doctors Hospital, (Intervener). (*Dismissed*).









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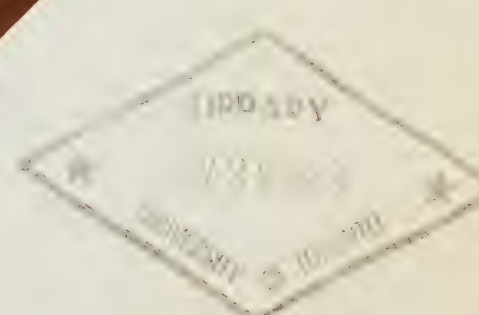


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# ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the  
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**Cited [1983] OLRB REP. JUNE**

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**0019-82-R; 0052-82-U; 0311-83-U** International Ladies Garment Workers' Union, Applicant, v. **Apple Bee Shirts Limited**, Respondent, v. Group of Employees, Objectors; International Ladies Garment Workers' Union, Complainant, v. Apple Bee Shirts Limited, Respondent; Antonio Rodrigues, Mrs. Antonio Rodrigues and Maria Oliveira, Complainants, v. International Ladies Garment Workers' Union, Respondent

**Certification - Discharge for Union Activity - Petition - Practice and Procedure - Unfair Labour Practice - Charges by employers against union unfounded - Failure to testify of person with knowledge of reason for lay-off not fatal - Lay-off and its timing not unlawful - Motive for selection of complaints for lay-off and delay in recall unlawful - Petition originating soon after lay-off - Son and daughter of forelady involved in petition - Petition not voluntary**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members W. F. Rutherford and F. W. Murray.

***APPEARANCES:** Steven Wahl and Herman Stewart for the trade union; J. D. Carrier and B. Appleby for the employer; S. Bernofsky and A. M. Rodrigues for the objecting employees.*

**DECISION OF R. O. MacDOWELL, VICE-CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; June 27, 1983**

1. This is an application for certification which has been consolidated with several related "unfair labour practice" complaints. In the main application, the International Ladies' Garment Workers' Union seeks certification as the bargaining agent for the employees of the respondent Apple Bee Shirts Limited ("the employer" or "the company"). Accompanying this certification application are certain unfair labour practice allegations against the respondent employer in which the union contends that, on April 2, 1982, a number of employees were laid off because they were, or were thought to be, trade union supporters. It is further alleged that following the layoff and the commencement of these proceedings, the recall of these aggrieved trade union supporters was delayed or denied because of their support for the union and their participation in the certification/unfair labour practice hearings. In addition, Tony Rodrigues and Maria Oliveira have made certain complaints about the conduct of the applicant union.

2. It was convenient to hear all of these related matters together. The hearings consumed some twenty-six days, during which the parties put before the Board voluminous oral and documentary evidence in support of their respective positions. Not surprisingly, some portions of this evidence were contradictory, while other portions differed only in nuance, depending upon the perspective or of particular witnesses. Moreover, the Board recognizes that when witnesses are testifying about events which have occurred some time ago, some inconsistencies will undoubtedly result from the imperfect recollection of partisans who are faithfully recounting the situation as they saw it. In these reasons, we do not think any useful purpose would be served by attempting to recount all of this testimony or distinguish between errors, exaggerations and falsehoods. We will have something to say below about the credibility of individual witnesses; however, at this point, it is sufficient to note that our findings of fact and credibility were

influenced by such factors as: the demeanour of the witnesses when they were giving their evidence, the clarity, consistency and firmness of their recollections, the ability of the witnesses to resist the influence of self-interest in shaping their testimony, and the plausibility of their version of events in light of contradictory evidence.

3. For ease of exposition, we will deal separately with the various issues raised in this case, beginning first with the allegations of impropriety made against the union in Board File No. 0331-82-U.

### *THE CHARGES AGAINST THE UNION*

4. The charges against the trade union can be dealt with summarily because, in our view, there is no basis to them whatsoever.

5. Maria Oliveira alleges that in the early evening of April 13, 1982, Ross Sutherland, one of the applicant's organizers, visited her home and was unduly persistent in urging that she and her sister should sign a union membership card. It is further alleged that Sutherland offered to pay certain benefits (including OHIP), and indicated that he would pay the required one dollar membership fee if they would sign cards. The allegation concerning the proposed money payment, of course, is of particular significance because the scheme of the Act requires that each new union member make a financial contribution unequivocally and on his own behalf. The one dollar payment is not merely symbolic. It is an essential requirement for union membership status under the Act (see section 1(1)(l), and the discussion *infra*). We find, however, that this allegation is entirely without foundation.

6. Ross Sutherland testified that he did visit Ms. Oliveira's home to discuss joining the union with her and her sister, who had also worked for Apple Bee Shirts. Ordinarily, Sutherland would have been accompanied by a Portuguese translator since neither of the women had much facility with the English language, and Sutherland is not fluent in Portuguese. However, the translator could not make it that evening so that Sutherland was by himself.

7. Sutherland spoke initially to Ms. Oliveira's sister and brother. The brother spoke English and was favourably disposed to the union. He served as translator.

8. Ms. Oliveira joined the conversation a few minutes after it began and Sutherland went through his "pitch" again, with the brother translating. According to Sutherland (and we accept his evidence in this regard), the conversation was amicable as he proceeded to explain the benefits which the union hoped to achieve through collective bargaining, the union's welfare programme, and the certification process. As it turned out, neither Ms. Oliveira nor her sister were interested in joining the union. The brother was not an employee, so Sutherland left.

9. We find that at no time did Sutherland ever offer to pay Ms. Oliveira's union membership fee. Any impression which she might have had to this effect, must be attributed to the quality of her brother's translation or her inability to comprehend what was being said to her; for, we are constrained to note, Ms. Oliveira had some considerable difficulty understanding and answering questions put to her on the witness stand, even though they were being translated into Portuguese. And we simply do not

believe her testimony concerning the way in which her allegations were formulated and made their way to the Board. In any event, we find that there was no intimidation or other impropriety in Sutherland's approach to Ms. Oliveira.

10. Tony Rodrigues asserts that on or about April 14, 1982, as he was driving home from work, he was followed for several blocks by a vehicle occupied by the union's organizers. Mr. Rodrigues characterizes this incident as a form of intimidation. Rodrigues is the key individual behind the circulation among the employees of a petition opposing the union's application for certification.

11. In the waning days of the union's organizing campaign, two or three union representatives were regularly on the street outside the respondent employer's premises handing out leaflets, reassuring supporters and, by their presence, providing moral support. When the last employee had left they would get into their car and drive back to the union office on Cecil Street. That is what they did on April 14th.

12. We have no doubt that on April 14th the union representatives paid close attention to Mr. Rodrigues, when he came out of the factory after the employees had left and just as they themselves were about to leave. They suspected that Rodrigues was the person whom they had been advised was circulating the petition against the union. We are also satisfied that as Mr. Rodrigues drove north on Bathurst Street to College Street and west on College Street, the union representatives' vehicle was behind him for several blocks. But the notion that he had been "intercepted" at Bathurst and Richmond Street (Rodrigues testified that on Richmond Street he saw the union representatives' car but they did not see him), or that there was anything conspiratorial or intimidatory about the incident, is a figment of Rodrigues' imagination. No doubt, the union representatives did notice Rodrigues, were behind his car, and did not attempt to pass; and, we do not doubt that Rodrigues may have attributed some sinister motive to this. But the fact is, that given the time of day, the location of the respondent employer's premises, the location of the union offices and the pattern of stop lights and one-way streets, there is nothing particularly unusual about the route taken by the union representatives on their way back to their office. And when Rodrigues turned south off College - which would be off that route - the union representatives' car simply went on its way. If the union representatives were making any serious attempt to follow Rodrigues, they certainly didn't expend much effort or go out of their way to do so. In our view, Rodrigues' allegations are out of all proportion to the actual events and, apart from indicating his own state of mind, should be accorded no significance in respect of the other and more difficult issues in dispute in this proceeding. Even if we were to find that upon encountering Mr. Rodrigues the union officials decided to follow him for a few blocks, and even if we were to decide that, in some respect, this constituted a breach of the *Labour Relations Act* (and we make neither determination), we would not be disposed at this stage to grant any substantive remedy nor alter our conclusions on the other matters at issue between the parties herein.

## *THE PETITION FILED BY OBJECTING EMPLOYEES*

### I

13. By decision dated May 7, 1982, the Board found that the applicant union was a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. The Board



further found, having regard to the representations of the parties, that all employees of the respondent employer in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period, constituted a unit of employees of the respondent employer appropriate for collective bargaining. For the purposes of clarity, the Board noted the agreement of the parties that the “designers” employed by the respondent employer should be treated as part of the office staff and excluded from the bargaining unit. The Board also determined that Kathy Bhoolai and T. Spiliopoulos, whose status was initially in dispute, did *not* exercise managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act*. Nor, on the evidence, does Tony Rodrigues. These determinations establish the description and composition of the bargaining unit.

14. In support of this application for certification, the trade union has filed documentary evidence of membership on behalf of *more than* fifty-five per cent of the employees of the respondent employer in the bargaining unit defined above. This documentary evidence takes the form of membership cards, which include a combination application for membership and an attached receipt. These cards are each signed by the individual employee concerned, and the receipts are countersigned by a witness (“the collector”) and indicate that a payment of one dollar has been made to the union in respect of its membership fees. The one dollar payment is in the nature of consideration and confirms the act of signing. This was the monetary payment referred to by Ross Sutherland in his conversations with Ms. Oliveira which she did not understand.

15. The documentary evidence of membership is supported by a properly completed Form 9, Statutory Declaration, attesting to its regularity and sufficiency. There is no allegation of any irregularity in the form of this documentary evidence, nor is there any alleged impropriety in the manner in which it was solicited, other than the allegations set out above which we have found to be without substance. Certainly there is nothing to call into question the “voluntariness” of the individual acts of signing or to suggest that, by so doing, the employees were not indicating their desire to be represented by the applicant union. The form and contents of this evidence then, are both consistent with the requirements of section 1(1)(l) of the Act, and, in addition, meet the form and time requirements prescribed pursuant to section 103(2)(j) of the Act. Accordingly, this documentary evidence, standing by itself, demonstrates that the union has a level of “membership support” in excess of that required by section 7(2) of the Act for certification without recourse to a representation vote [i.e. more than 55% of the employees in the bargaining unit are union members within the meaning of section 1(1)(l) at the time determined under sections 7 and 103(2)(j)].

16. However, there was also filed with the Board a “petition” signed by a number of employees indicating that they wish to oppose the certification of the applicant. This petition includes the names of certain individuals who have also signed membership cards and paid one dollar in respect of membership fees and, therefore, at the relevant time, were “members” of the union within the meaning of section 1(1)(l) of the Act. These individuals signing the petition had had a purported change of heart, and now allegedly no longer wish to support the applicant’s certification. If it were established that this change of heart was a voluntary one, so that the union’s documentary evidence may not fully reflect the employees’ subsequent or current wishes, the Board would normally

exercise its discretion to order a representation vote to resolve the question of the applicant's right to certification – even though the union's documentary evidence of membership establishes that more than fifty-five per cent of the employees were "members" of the union as that term is defined in the statute. This is the course of action urged upon us by the respondent employer and the employee objectors.

## II

17. The system of certification prescribed in Ontario by the *Labour Relations Act* rests primarily upon an examination of the union's documentary evidence of membership to determine whether a clear majority of the employees have become members of the union and support its certification. Upon showing the requisite membership support, the union is "certified" or granted a licence to bargain on behalf of the employees – subject, of course, to their right to file a timely application terminating bargaining rights. The Board does not solicit *viva voce* opinions about the virtues of trade union representation, nor, in this jurisdiction, is a representation vote the primary vehicle for achieving the right to represent employees. That right depends upon the solicitation of a sufficient number of membership cards authorizing the union to act as bargaining agent, and to protect employees from possible employer reprisals (an illegal but not infrequent response) the anonymity of the union supporters is preserved.

18. This system relying upon documentary evidence has been in place now for more than thirty years, and any residual judicial doubts about how the Board should go about its task have frequently been resolved by amending the statute [for example, section 1(1)(l) of the Act confirming the Board's established approach to union membership evidence and reversing the decision in *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796 et al.* (1970) 11 D.L.R. (3d) 336 (S.C.C.)]. Over the years then, there has developed an established and fairly well understood regulatory framework governing union membership evidence, as the Board has sought to apply sections 1(1)(l) and 103(2)(j) to the special circumstances of particular cases – as, for example, where the one dollar payment is loaned to a potential union supporter, or where the card is not properly witnessed, or where the card is valid on its face but has been obtained through misrepresentation or intimidation, or where there is a problem respecting one or a few membership documents but not the others, etc. Of course, over the same period, there has also been an active and ongoing debate about the utility of representation votes as an alternative (and, some would argue, better) means of testing union support; but, to date, the Legislature has been disposed to stick with the existing scheme as the Board has interpreted and applied it. So have most other Canadian jurisdictions. In those jurisdictions too, representation votes are a residual mechanism resorted to only where the union cannot demonstrate a "clear majority" (i.e., in Ontario, more than fifty-five per cent), or where, in the discretion of the Labour Relations Board, a representation vote should be held in the particular circumstances of the case. One of those circumstances is a purported change of heart by employees who have previously signed union membership cards.

19. Neither the Legislature nor the Ontario Board has taken a myopic view of the realities of the process of union organizing. Unions grow by persuading employees that they will be better off by exercising their statutory right to engage in collective bargaining. Employees join unions to improve their wages and working conditions, to

enhance their job security and to obtain protection from arbitrary discharge. But having indicated initial support for a trade union, employees can and do change their minds. While in some jurisdictions the statute precludes or inhibits the placing of such “changes of heart” before the Board (British Columbia, Canada) so that certification is more often based solely on membership cards, and in others such employee views are irrelevant because the preferred method of testing employee wishes is a representation vote in any event, Ontario has evolved a middle position recognizing the validity of union membership cards, but retaining some flexibility to seek the confirmatory evidence of a representation vote where employees have put before the Board a timely “petition” or other document indicating a change of heart. Petitions, too, have been part of the certification process for many years.

20. The Board recognizes, of course, that statements in opposition to the union’s certification (see Form 6), usually in the form of a “petition”, are not regulated by the Act as directly or precisely as union membership evidence. There is no statutory definition equivalent to section 1(1)(l), nor is there any requirement for a monetary payment, in the nature of consideration confirming the act of signing. There is no statutory declaration similar to Form 9 attesting to the regularity and sufficiency of the membership evidence. There is usually no confirmatory signature of a subscribing witness as there generally is on union membership cards. Nevertheless, the existence of employee statements in opposition appears to be contemplated by section 103(2)(j) of the Act and Rule 73 of the Rules of Practice, and, in any event, the Board has a long-established practice of accepting them and exercising its discretion to order a representation vote where: the petition is *voluntary* (as evidenced by testimony adduced in accordance with Rule 73 of the Rules of Practice), and the petition contains the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt whether the requisite number of union “members” (as defined by section 1(1)(l) of the Act) continue to support the union’s certification.

21. The Board must be satisfied, however, that when these union supporters sign a petition indicating an apparent change of heart, they are doing so voluntarily, and are not motivated by a perceived threat to their job security or a concern that their failure to sign will be communicated to their employer, and result in reprisals. It must be clear that the circulation of the petition is free from the actual or perceived influence of management. Often, as in the present case, a petition will be signed by employees who have already indicated their support for the union only a short time before, and a natural question arises as to what prompted this sudden change of heart. Was it prompted by a reappraisal of the value of collective bargaining, or by a reluctance to identify oneself as a union supporter when presented with the petition document? An employee can be reasonably assured that his support for the trade union will not be communicated to his employer, but he may have no such assurance concerning his refusal to sign a petition opposing the union.

22. In a number of cases such petitions have been openly circulated on the employer’s premises by employees who, in their opposition to the union, will be objectively aligned in interest with their employer and may be perceived to be acting on its behalf. In the circumstances, an employee may sign a petition because he fears that a refusal to do so will expose his support for the union, and will be made known to his employer. Nor (unfortunately) is this concern so patently unreasonable given the number



of cases coming before this Board in which the hand of management was behind a petition opposing the union, or in which employees have been victimized because they supported a union. Similarly, an employee may be motivated to sign a petition because of overt employer conduct which suggests that continued support for the union could result in the loss of his job or other adverse employment consequences. This too has frequently arisen in proceedings before the Board. In such cases one cannot regard the signing of a petition as a truly voluntary act – although, of course, the mere identity of interest between the employer and the objecting employees is obviously not sufficient, in itself, to link the petition with management in the minds of reasonable employees, or to undermine the reliability of the signatures placed upon it. There must be something more than that, and each case must be considered on its own merits.

23. It is for this reason that the Board undertakes the enquiry contemplated by Rule 73(5) of the Rules of Practice, in order to satisfy itself from the circumstances of the origination, preparation, and circulation of the petition, that the document truly represents the voluntary wishes of those who signed it. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043, the Board discussed the nature of this enquiry in a long passage to which we might usefully refer:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the “sudden change of heart” by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board’s approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16,264 in the following terms:

“In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.”

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed

by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

Reference might also be made to the following passage from *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387, wherein the Board has recently reaffirmed its approach to such employee statements:

Before reviewing each of these issues it is useful to understand the general legal and policy background against which petitions are considered by this Board. There is usually and naturally an identity of interest between an employer and those of his employees interested in opposing an applicant trade union. In this context the circulation of a statement of desire involve petitioners approaching their fellow employees to solicit support. Understandably, an employee so approached may worry or feel anxious that his refusal to sign such a petition will become known to his employer given this natural interest employers have in employees opposing the trade union. But, this identity in interest between employer and opposing employees, standing alone, has never been viewed by this Board as undermining the reliability of signatures placed on a circulated petition. If this were not so, a petition could never be found to be voluntary. On the other hand, this is not to say that a similarity in interest between employer and petitioners is irrelevant and, indeed, it is the reason why this Board subjects the origination and circulation of a statement of desire in opposition to an application for certification to considerable scrutiny. There is an onus on those employees who present the documentary evidence to the Board to demonstrate that the signatures contained therein constitute a voluntary expression of the wishes of those employees who on recent and earlier occasion joined the applicant trade union. It is in this context that the Board, in the often cited *Pigott Motors (1961) Ltd.* case, 63 CLLC ¶16,264, made the following observations:

• • •

41. Actions by either the employees opposing the trade union or the employer can adversely affect the reliability of a statement of desire. Direct and open support by an employer will obviously suggest a relationship between the employer and the petitioners that would reasonably cause anxiety in the minds of employees approached by

the petitioners. Therefore, in such circumstances, it would be just as reasonable to infer that the employees signed the document to conceal their support for the trade union as it would be to conclude that they signed voluntarily. Where this is the case, the Board usually takes the view that the petitioners have not satisfied the onus on them and the statement of desire is dismissed as an unreliable indicator of the true wishes of the employees. Similarly, actions by the petitioners without support of the employer can equally destroy the reliability of a statement of desire. Circulating a document in the presence of foremen or representations clearly indicating support by the employer can produce the same anxiety in the minds of employees whose signatures are solicited and thus prompt the Board to respond in a similar fashion.

### III

24. It is against this background that we approach the petition in the instant case, and in determining the significance to be accorded to it, we will be referring to certain features of the evidence which are also relevant to an assessment of the union's unfair labour practice charges. Indeed, in the union's submission the two issues cannot really be separated. The union argues that the layoff on April 2, 1982 was designed (at least in part) to remove a number of prominent union adherents from the work place - thereby graphically illustrating to those remaining the consequences of supporting a union. It was shortly after that layoff that Mr. Rodrigues began urging employees to sign a petition signifying that they did not wish to have a union to represent them, and, as we have already noted, that petition contains the signatures of some individuals who, prior to the layoff, had indicated exactly the opposite when they signed union membership cards. Moreover, Mr. Rodrigues is the son of Herminia Abrantes, the forelady. Mrs. Abrantes runs the shop on a day to day basis and was responsible for the selection of the employees to be laid off.

25. We will begin by outlining certain of the employer's responses to the union's organizing campaign, then turn to the direct evidence concerning the origination, preparation and circulation of Mr. Rodrigues' petition. The unfair labour practice allegations will be examined specifically and in somewhat more detail in a later section of this decision.

26. The union made its initial contact with the employees in the fall of 1981. Then, as later, the organization efforts involved the circulation of pamphlets extolling the virtues of trade unionism and the benefits that employees could expect to achieve through collective bargaining. Several employees brought these pamphlets to the attention of Herminia Abrantes, so that as early as September, 1981, she was aware of the union's efforts to organize the company's employees.

27. But that is not the only indication that Mrs. Abrantes had of the I.L.G.'s organizing efforts. One evening, by mistake, Ed. Ziemba, a union organizer, visited Mrs. Abrantes at her home under the misapprehension that she was a rank and file employee who might be interested in supporting the trade union. Not realizing who Mrs. Abrantes actually was, Ziemba identified himself as a trade union organizer and told her that he



had obtained her name from Maria Camara, another employee of the company who was assisting the union. Ziemba then went into his pitch on the virtues of collective bargaining, but cautioned his listener that if she were disposed to support the union and help solicit other supporters she should be careful not to approach the forelady. Mr. Abrantes, enjoying the scene, indicated that all of the employees were happy, and no one wanted the union. She then revealed her identity to Ziemba who, somewhat surprised and a little embarrassed, left shortly thereafter. This incident establishes two matters relevant to this case: Mrs. Abrantes was well aware of the union's organizing efforts as early as the fall of 1981; and she was also aware that Maria Camara was an early supporter of the union.

28. The next day, Mrs. Abrantes approached Maria Camara and asked her if she had signed for the union. Camara denied it, although, she is, in fact, a trade union supporter. Later that day Mrs. Abrantes discussed the trade union situation with Barry Revson, then the company's production manager. It was decided to hold a meeting of all of the employees to discuss the situation and try to determine whether the employees really wanted a trade union to represent them.

29. The employees were summoned to the cafeteria, and Revson addressed them. His words were translated into English, Portuguese, Chinese and Greek. A tape recorder was set up and left to run in plain view of the employees present. Presumably, the respondent company wanted an accurate record of what was said to and by employees.

30. The complete text of Revson's address to the employees was not put in evidence. What is clear, is that he asked them if they really wanted a trade union to represent them and specifically urged anyone who did support the union to raise her hand. No one did. Apparently dissatisfied with this lack of response, Revson then told the employees that they should not be afraid, no one would be fired for supporting a union, and that the company would assist the employees to form a trade union if that was their wish. Still no one identified herself as a trade union supporter.

31. Why did Revson make this unusual plea suggesting that the company was not averse to unionization and would even assist in the process? Revson did not give evidence and we need not speculate about his motives. It suffices to note that the employees' reaction is consistent with the Board's own experience in such matters.

32. Normally an employer is opposed to trade unionism, and in light of this common response, employees can reasonably fear that their identification as trade union supporters would be viewed unfavourably by their employer and might even put their jobs in jeopardy. It was precisely this fear which Revson addressed when he told the employees that they would not be fired if they identified themselves as union supporters. Whether this representation was *bona fide* or not, we need not here determine. The point, as Revson clearly recognized, is that employees who seek to exercise their statutory right to form or join a trade union often do so with the knowledge that if their activity is discovered they may be subjected to censure or adverse employment consequences. The right to collective bargaining may be guaranteed by law, but the practical reality is that if employees seek to avail themselves of that right, they face certain risks. It is hardly surprising then that none of the company's employees were prepared to take a chance and identify themselves to Revson as trade union supporters -



despite his assurance that they could do so freely. Nor was Camara prepared to admit it to Mrs. Abrantes, the forelady.

33. After the employer's meeting with its employees, the trade union's organizing campaign was suspended for a time. It began again, in earnest, in March, 1982. Once more, there were personal contacts with employees interested in trade union representation and the circulation of leaflets setting out the union's views on the advantages of collective bargaining.

34. The bulk of the union's support was solicited in the last two weeks of March, 1982, following a meeting at the home of Lucinda Sousa. The meeting was attended by a number of employees who supported the union's organizing campaign and it was agreed that they would provide assistance by speaking to other employees at the factory, identifying potential union supporters, and encouraging their co-workers to sign cards authorizing the union to represent them. The actual collection of cards was undertaken by the applicant's full-time organizers who visited employees at their homes. Of the seven employees who attended that meeting, six were laid off on April 2nd, including Lucinda Sousa herself and other employees with a number of years of apparently satisfactory service. Maria Camara, for example, had been employed by the company for eight years and was regarded as a good worker. Yet while employees like Camara were laid off, other employees with much less seniority were retained. A number of employees, including those who had been laid off, formed the impression that their support for the union was a factor in the employer's determination as to who should be laid off. This too is hardly surprising, given that of the sixteen employees who were laid off, many were trade union supporters, including all of those who had been particularly vocal.

35. Contemporaneously with these efforts by trade union supporters to promote the union through informal discussions with their fellow employees, union organizers were at the employer's premises giving out multilingual pamphlets and speaking to present and potential supporters as they left work or made their way to the parking lot. The organizers made no effort to hide what they were doing. The form of these pamphlets is interesting and may explain the employer's response to them.

36. Each pamphlet consists of a number of pages in various languages, giving background information about the union, the benefits obtainable through collective bargaining, and the telephone numbers of the three union organizers. Attached to these documents is a card on which employees are encouraged to write their name and address, and a stamped envelope, returnable to the I.L.G.'s address in Toronto. The card expressly provides that signing it carries no obligation to join the union, however, by signing it, an employee obviously does indicate an interest, and facilitates personal contact away from the employer's premises and the possible scrutiny of members of management or others opposed to the union's cause. In an organizing campaign, one of the hurdles which a union must overcome is its imperfect knowledge of the numbers, names, addresses, and status of employees potentially in the bargaining unit, and its limited access to those employees on the employer's premises. The union must also be concerned lest employees opposed to it seek to demonstrate their loyalty to their employer by revealing the names of trade union supporters (just as employees of the opposite persuasion will typically identify potential adherents). The mailed card is a method of meeting some of these difficulties. It not only reveals the depth of the union's potential support (the key to a

certification application), but also facilitates more personal and private contact between the union's organizers and potential members.

37. On or about March 15th, the next working day after the leaflets were circulated, several employees came to Mrs. Abrantes' office and gave her the leaflets they had received. Initially, Mrs. Abrantes told them that she was not interested and had no need for the leaflets. The employees, however, urged her to keep the leaflets to demonstrate that they had been turned in.

38. Later that morning, Mrs. Abrantes showed one of the leaflets to Barry Appleby, the company's owner who, according to Mrs. Abrantes (Appleby did not give evidence), asked if everyone had turned in her pamphlet and what the other employees had done with their pamphlets. Mrs. Abrantes indicated that she would find out, and thereupon left Appleby's office with this in mind. First she made a list of the names of the employees who had already given in their pamphlets, and, in addition, wrote their names on the pamphlets themselves. She then began to circulate among the employees in the factory asking each one if she had received a leaflet and, if so, what she had done with it. As she went from one to the other, she carefully compiled a list of those employees who had turned in the pamphlet, and those who had not yet done so. Those in the latter group were told that they should bring in the pamphlet on the following day. Ana Medeiros was told that Mrs. Abrantes was collecting the pamphlet "for the boss". Mrs. Abrantes told Tina Cabral that anyone who did not give in a pamphlet would be sent home - a suggestion which caused Cabral some concern since she had already signed the card and was about to put it in the mail.

39. Each employee was pressed to bring in the union literature, even if it was at home. One employee brought in her pamphlet even though it had been ripped up. Another who had initially said that her children had destroyed it, produced the leaflet a day or two later. Mrs. Abrantes was insistent. "Are you sure you put it in the garbage?" she asked Ana Medeiros. Each name was duly added to the list which Mrs. Abrantes was compiling. A number of the union's witnesses testified that it was obvious what she was doing so because as she went from employee to employee she was continually making notations on the list which she was carrying with her.

40. This list was later shown to Mr. Appleby, although, according to Mrs. Abrantes, he did not look at it or show any interest - an assertion which we find as difficult to accept as her assertion that she acted entirely on her own. It was Appleby, after all, who initiated the enquiry by asking if all of the employees had handed in their pamphlets and where the others were. Mrs. Abrantes also testified that she did not have the two lists of employees which she had prepared (i.e., of those who had or had not turned in their pamphlet), and later made no use of or reference to those lists. In particular, she denied that there was any correlation between those employees laid off on April 2nd, and those who failed to turn in a leaflet. But if these lists were so inconsequential, why did she go to such trouble to collect the pamphlets and compile a record of employee responses? Mrs. Abrantes did produce in evidence a number of pamphlets with employee names written on them which she said she had kept in her desk for some months. She gave no explanation as to why she would keep documents which, according to her, were unnecessary, had been put aside, and were not referred to again until raised as an issue in these proceedings many months later. In contrast, according to Mrs. Abrantes, the two

lists of employees which she had so carefully prepared were both destroyed. So was a list of employees deemed to be surplus from which the persons laid off were selected.

41. We note further that in direct examination, without reference to the pile of pamphlets, Mrs. Abrantes was able to recall with remarkable clarity those individuals who had handed in a pamphlet to her, those who had not, and the explanations tendered by various employees. But when asked the very same question by counsel for the union in cross-examination, Mrs. Abrantes initially said that she had no recollection of *any* of the names of any of the individuals who had refused to give in their pamphlet – in direct contradiction to her earlier evidence adduced in response to questions from her own counsel. Nor was this her only lapse of memory during her cross-examination, nor the only instance in which her answers to union counsel were contradicted by her own earlier evidence.

42. Mrs. Abrantes' last efforts to solicit pamphlets occurred towards the end of the week of March 15th. No more pamphlets were brought to her until some two weeks later, after the April 2nd layoff. Whatever the motivation for Mrs. Abrantes' activities (counsel for the union argues that the whole purpose of the exercise was to identify union supporters and inhibit contact with the union), the layoff of April 2nd apparently prompted some more employees to come forward with documents which, if retained, might lead to the inference that they were interested in the union.

43. Evidence concerning the origination, preparation and circulation of the petition was given by Tony Rodrigues, its principal sponsor, and Gale Quesnelle, another employee in the shipping department who helped him. Rodrigues also received the assistance of Helena Arruda, Nancy Rodrigues, and Estrela Knight, all of whom approached employees – often several times – to urge them to see Tony and sign the petition against the union. Helena Arruda works as Mrs. Abrantes' assistant and acts as a conduit of information to and from her. For example, Arruda was present in the meeting when Mrs. Abrantes advised a number of employees that they were being laid off on April 2nd; it was Arruda who informed Emilia Bettencourt a couple of weeks earlier that she was being laid off for a week; and it was to Arruda that Bettencourt made complaints about her sewing machine for transmission to Mrs. Abrantes. Estrela Knight is Mrs. Abrantes' daughter and works in the office with her for several hours everyday. Nancy Rodrigues is Tony's wife and Mrs. Abrantes' daughter-in-law.

44. Shortly after giving the above evidence (i.e. that Arruda acted as a conduit of information from management and was closely associated with Mrs. Abrantes), Bettencourt was approached by Mrs. Abrantes and told that Arruda was not managerial and that any complaints should be made directly to her. This exchange clearly indicates that although Mrs. Abrantes was an excluded witness at that point, she was being advised of Bettencourt's evidence and, in particular, Bettencourt's suggestion that Helena Arruda was part of the management team. We have taken that into account in assessing her credibility.

45. Rodrigues and Quesnelle were both closely cross-examined on their evidence concerning the petition, although that cross-examination was necessarily somewhat circumscribed because of the need to preserve the anonymity of the individuals who had signed the petition (see section 111 of the Act). As we have already noted, the purpose of



this enquiry was so that the Board could be assured that the petition really was a voluntary expression of those who signed it. Accordingly, witnesses were asked such questions as: who prepared the document, how, where did the wording come from, who typed it, how it was circulated, who brought it to the Board, etc. These questions may seem irrelevant to someone unfamiliar with the procedures before the Board, but the fact is that this is the only way to test the credibility of the individuals who put forward a petition and, as here, state both that there was no management involvement whatsoever, and that the circumstances are such that the Board can rely upon it as an accurate expression of employee wishes. For, of course, credibility is an important issue here. In a number of instances in recent years contradictory or implausible answers to these seemingly innocuous questions have led to the exposure of the hand of management behind a petition which its proponents assert was entirely their own idea. In *Conair Canada*, [1982] OLRB Rep. Feb. 159, for example, a petitioner's fabrications only began to unravel when it was revealed that the petition documents which, according to him, had been typed on a single typewriter, bore two different type faces and when he was unable to explain the origin of a number of xerox copies of his petition. It turned out that the entire process was orchestrated by management from start to finish. On another occasion the Board was prompted to doubt a witness' veracity when he testified that by miraculous good luck, a random choice of solicitor from the yellow pages of the Toronto Telephone Directory brought him into contact with one of the three or four lawyers who frequently appear before the Board representing petitioners in certification proceedings - and this was at a time when solicitors were not permitted to indicate their preferred areas of practice! That is why both Rodrigues and Quesnelle were closely questioned on the steps they took to draft the petition, solicit signatures, and get the petition before the Board.

46. Quesnelle told the Board that she was present when the Form 6, Notice to Employees, was posted by Mr. Appleby and Mike Salsberg, the firm's accountant. She testified that Appleby told her to read it, but commented that he could not discuss it further. She and Tony Rodrigues discussed the matter and decided to circulate a petition against the union. According to Quesnelle, the wording of the petition was a joint effort and it was typed by Tony Rodrigues. Signatures were then gathered at Tony's desk in the shipping department. Tony advised her that it was important not to solicit signatures during work time, or when members of management were around for, as Quesnelle put it, it was important not to "break the rules". Such "rules" do emerge from the Board's cases but it is less clear how or why Tony would be aware of such "rules", or would put the matter that way.

47. The draft petition was prepared April 7th, typed, dated April 8th, then circulated in the week of April 12th. It was delivered to the Board on the afternoon of April 15th, the terminal date. Quesnelle listed a number of individuals whose signature she had witnessed herself, referring to numbers placed on the petition so that the identity of the individuals would be preserved. Rodrigues did the same.

48. According to Quesnelle, after the first hearing she and Rodrigues decided that they needed a lawyer and Rodrigues selected one from a list of lawyers supplied by the Board. It was in that manner that they were put in touch with a firm of solicitors who frequently act in petition cases. Quesnelle affirmed that there had been no discussions



with any member of management about the petition other than the non-committal remarks of Barry Appleby mentioned above. The Board does not refer people to solicitors or suggest names of counsel.

49. Rodrigues' evidence substantially confirmed that of Quesnelle. But not entirely. Rodrigues said that after he and Quesnelle had decided they needed a lawyer *both* were active in the effort to find one. He said that they both took turns calling and went to various community centres seeking assistance. Rodrigues told the Board that on some occasions he went by himself and on others Ms. Quesnelle accompanied him. Quesnelle said nothing at all like this. Rodrigues testified that he acquired his present legal representative through a referral from a lawyer whom he had already been consulting on other matters.

50. However, this was not the only troubling feature of Rodrigues' evidence. He and his sister (Estrela Knight) live in the same apartment building and share the typewriter on which the petition document was typed, moreover, he has frequent contact with his mother everyday in the course of his work. His mother, as supervisor of the factory, is also regularly circulating on the shop floor itself overseeing the employees' work. But, according to Rodrigues, he never once mentioned the petition to his mother, and according to Mrs. Abrantes, she had no idea a petition was being circulated against the union or that her son and daughter were involved. The evidence of all of the other witnesses was that it was common knowledge that a petition was being circulated and that Rodrigues was the person to see. Indeed, at times there were groups of employees congregating in the shipping area for the purpose of signing the document. While traditional family ties may not be as strong as they once were, it is difficult to accept the evidence of Mr. Rodrigues and his mother that he never once mentioned his activities and that she had no inkling of them.

51. We note further that on cross-examination, Rodrigues initially denied having any knowledge of what his sister's job was. He said he didn't know whether or not she regularly worked in the office with his mother. This fact was established unequivocally by the evidence of other witnesses and must have been well known to Rodrigues himself. Why should he deny it except to deflect or minimize the connection between Mrs. Abrantes and the petitioners? Ms. Knight, as we have noted, had become active "drumming up support" for the petition and her name appears near the beginning of the list of signatures on the document itself.

52. Nothing much turns on the inconsistencies between Quesnelle and Rodrigues as to which signatures Quesnelle witnessed or who was present at the time. Such inconsistencies or lapses of memory are to be expected – although it is interesting to note that Rodrigues' assertion that he was always careful to mask the signatures of the persons signing to preserve confidentiality is contradicted by the evidence of other witnesses and not confirmed even by Quesnelle. Of more concern is the statement by Rodrigues that he clearly recalls approaching one particular individual at work one morning and soliciting her signature at work the same afternoon. Other evidence tendered by the employer indicates that she was on layoff at the time and not even in the plant. How did her signature come to be on the document? This may simply be a mistake. But it is equally plausible that Mr. Rodrigues was filling in gaps in his memory with fabrications which he

knew would be difficult to check. Mr. Rodrigues also told the Board that he specified the employer's address as the proper address for further communications from the Board concerning his petition because he went to night school and sometimes returned home late. Why that should matter is really not too clear.

53. Mr. Rodrigues was also closely and repeatedly questioned about the origin of the photocopies which he had made of his petition, since he initially testified that he had made only *one copy* of the petition, that copy had been made at the Labour Relations Board just before handing in the petition, and that he had later given it to his lawyer. Mr. Rodrigues said he clearly recalled making this single copy at the Board, for he had taken money out of his pocket and used the coin-operated machine available to the public. This version of events was repeated three or four times in response to what appeared to be a prolix and pointless portion of counsel's cross-examination. But it wasn't; for counsel knew, as the witness did not, that the copy said to be made at the Board could not possibly have been produced there. The Xerox equipment in use produces a quite different kind of copy, and, in accordance with government practice, the paper used is metric. When this fact was pointed out to Mr. Rodrigues he told the Board that he now recalled stopping at the Sanderson Library on his way to the Board to make a copy of his petition. It was another document that he copied at the Board – although when the Board adjourned to allow Mr. Rodrigues to go to his home to search for it, it could not be found that day. (What purports to be the document was produced when the hearing reconvened some weeks later.) Rodrigues said that a second copy of the petition was also produced at the Sanderson Library on April 22nd, in anticipation of his meeting with his solicitor the following day. However, he had earlier said that on March 15th, after filing the petition with the Board and in anticipation that he would be asked about it, he spent a few minutes in his car making marginal notes on the single copy so that he could recall the date on which some of the signatures had been collected. However, these marginal notes do not appear on the second copy of the petition produced by Mr. Rodrigues' counsel at the hearing as should be the case if Mr. Rodrigues' version of events was accurate. Finally, in the closing minutes of his testimony, in response to a question from counsel for the company, Mr. Rodrigues indicated that Delia Cabral had accompanied him on his journey from the plant to the Board on March 15th. Ms. Cabral's presence, of course, might raise questions about how two employees could leave work in the middle of the afternoon to make that delivery; but she could also confirm Mr. Rodrigues' testimony about how the copies of the petition came into existence about which there was so much confusion. Delia Cabral did not testify.

54. Some additional comment might be made about the evidence of Mr. Rodrigues' approach to the employees and their reaction to him. Some of the employees seem to have regarded Mr. Rodrigues as a spokesman for the company, for he was asked what benefits Mr. Appleby was prepared to give. Rodrigues told them that he couldn't guarantee anything but he thought that the company would be able to match anything which the union could offer. When Natalie Rocha refused to sign his petition, Mr. Rodrigues remarked "then you must have signed for the union". Mr. Rodrigues concluded, correctly, that a reluctance to sign the petition could be equated with support for the union. Nancy Rodrigues told Rocha on the morning of March 15th that this was the last opportunity she would have to sign the petition and if the union got in the company would start checking the employees' work and find reasons to fire them. Finally, all of the union witnesses who testified about this matter said that they regarded the

petition as a document they were being asked to sign to signify they were in favour of the company or, as they put it, they were being asked to sign "for the boss". Cecilia Furtado, who had signed a union membership card and supported the certification application, said that she signed the petition because she was afraid of being sent home like the other union supporters who had been laid off on April 2nd.

55. Testimony of this kind is not unusual in petition cases and we mention it here only because it serves to underline certain of our earlier observations. A trade union organizing campaign is no neutral event in the affairs of a business. Employees frequently, and quite reasonably, feel apprehensive about their employer's reaction if they are identified as the "culprits" who have brought the union upon him - hence the employees' response to Revson's enquiry, and Camara's answer to Abrantes when asked if she supported the union. Indeed, the reality of this fear and the basis for it are recognized in those provisions of the Act which prevent disclosure of the identity of union supporters. The fact that the employees are exercising a statutory right is quite beside the point. Typically, employees have no desire to advertise the fact that they are union supporters to their employer or to persons who might convey that information to their employer. Yet that is precisely what they are asked to do when presented with a petition - as Tony Rodrigues' comment to Natalie Rocha indicates. Her refusal to sign his petition was regarded, correctly, as an indication that she had become a union member. And that is why Furtado signed the petition. She knew that to do otherwise would show that she too was in favour of the union and might expose herself to possible reprisals.

56. It is regrettable that trade unions are forced to act surreptitiously, and unfortunate that employees are reluctant to admit that they have done something which they have a statutory right to do. But that is the reality of the employer-employee relationship at the point when employees are seeking for the first time to establish a collective bargaining relationship. We repeat, moreover, that it is a reality which is recognized by section 111 of the Act which preserves the secrecy of union membership. That section was enacted in response to these legitimate employee fears that disclosure of their support might result in (albeit illegal) reprisals. Where, as here, those fears are evident in the evidence, we do not think they can be ignored.

57. How then are we to assess the documentary evidence before us in this case? On the one hand, we have the union's evidence of membership which is regular in all respects (subscribing witnesses, confirmatory monetary payments, statutory declaration of regularity, etc.) and there is no impropriety in the manner in which that evidence was solicited. There is not even much evidence of peer pressure. On the other hand, we have the petition circulated by Tony Rodrigues, the son of Mrs. Abrantes, the forelady, with the assistance of Estrela Knight, her daughter (who also works in Mrs. Abrantes' office), Helena Arruda, Mrs. Abrantes' assistant and Nancy Rodrigues, Mrs. Abrantes' daughter-in-law. Nor was Mrs. Abrantes a neutral actor in the piece. She was responsible for the selection of the employees to be laid off a little over a week before her son started circulating his petition - a layoff which many employees believe (and the union alleges) was motivated by anti-union considerations. Barely two weeks before that, Mrs. Abrantes was herself circulating among the employees making lists of who were going to be "good girls" (as she put it) and hand in their trade union pamphlets to her. The significance of this action is perhaps best illustrated by the conduct of some of the employees who had not yet handed in their leaflets. Following the April 2nd layoff, they apparently had



second thoughts about retaining material from the union and came to Mrs. Abrantes' office to present it to her. Then, a couple of weeks after the layoff, Mrs. Abrantes' son was circulating yet another list with the assistance of her daughter and assistant. This time the employees were asked to indicate that they were opposed to the union or, as some of the witnesses put it, "in favour of the boss". To do otherwise would prompt the inference that they were union members (as Rodrigues correctly concluded in Rocha's case) who, as Furtado feared, might share the fate of the union supporters laid off on April 2nd. That is why Furtado signed the petition, and we have no doubt that the layoff of a large number of employees, predominantly union supporters, out of seniority, generated considerable apprehension among those employees who had earlier signified their support for the union. That concern is understandable and, in our view, a reasonable one. Finally, there are the troubling aspects of Mr. Rodrigues' evidence and the improbable assertion by both Rodrigues and Mrs. Abrantes, that Mrs. Abrantes never discussed the petition or the union with her son, daughter and assistant, and was entirely blind to the activity going on around her about which everyone else appears to have been aware.

58. Having regard to the totality of the circumstances concerning the circulation of the petition, the Board is not satisfied that it represents a reliable indicator of the voluntary wishes of the union supporters who signed it or that it should weaken the effect of the employees' documentary evidence of union membership. Accordingly, the Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent employer in the bargaining unit, at the time the application was made, were members of the applicant trade union on March 15, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

59. A certificate will therefore issue to the applicant union in respect of the bargaining unit set out in paragraph 13 above. Since the union is entitled to certification by reason of its membership support among the employees, it is unnecessary to consider its request for certification pursuant to section 8 of the Act.

60. We turn now to the union's unfair labour practice charges and, in particular, the contention that the layoff of certain employees on April 2nd and the order of their subsequent recall was influenced by their support for the union.

### *THE UNFAIR LABOUR PRACTICE ALLEGATIONS AGAINST THE RESPONDENT COMPANY*

#### I

61. We begin by acknowledging at the outset the difficulty which we have had in respect of this aspect of the case - although we also note that this difficulty was compounded by the quality of the evidence given by Mrs. Abrantes, the only witness called by the company. It may be useful once again to set out the context in which we have approached the union's unfair labour practice allegations.

62. Where it is alleged that an employee has been discharged or otherwise dealt with contrary to the Act, it is incumbent upon the employer to come forward with an explanation for his actions which is entirely free of anti-union animus. If the employer's conduct is motivated in whole or in part by an employee's membership in a trade union, or the exercise of rights protected by the Act, then that employer's conduct is illegal. See: *R. v. Bushnell Communications et al.* (1973) 1 O.R. (2d) 442 (O.H.C.); affirmed 4 O.R. (2d) 288 (O.C.A.); *Sheehan and Upper Lakes Shipping Limited et al.* (1977) 81 D.L.R. (3d) 208 (Fed. C.A.); *Westinghouse Canada Limited*, [1980] O.L.R.B. Rep. April 577, affirmed by the Ontario Divisional Court, *sub nomine Westinghouse Canada Inc. v. United Electrical, Radio, and Machine Workers of America, Local 504 et al.* 80 C.L.L.C. ¶295. In the instant case, therefore, it must be established that the reasons given by the employer for the layoff and the selection of employees to be laid off are entirely free of anti-union considerations.

63. Since 1975 the legal onus in unfair labour practice cases, such as this one, has been cast upon respondent employers by what is now section 89(5) of the Act. However, in this proceeding (for reasons which need not be dealt with here), the union proceeded first, and its evidence established, *inter alia*: that at the height of the union organizing campaign a large number of its supporters were unexpectedly laid off; that those laid off included a number of senior employees who had never been laid off before and who had always been regarded as good workers; that less senior or experienced employees were retained; that virtually all of the individuals who had attended the initial and only union organizing meeting were laid off; that Mrs. Abrantes, the employees' supervisor, had shortly before the layoff engaged in activities which could reasonably be regarded as an effort to identify employees who were or were likely to be union supporters - just as the former plant manager had done more explicitly some months earlier; and that while old and experienced employees remained on layoff, the company hired several new employees who had recently arrived from Portugal and had no experience at all. In our view, an onus of explanation would arise in this case, apart altogether from section 89(5). The real difficulty lies in assessing the quality and credibility of the employer's reasons for the layoff and for choosing the individuals selected for layoff.

## II

64. The evidence establishes that the employer has been experiencing business difficulties for some time. Throughout 1981 and 1982, its output was substantially below 1979-80 levels, when the company was operating two complete production lines with a total capacity of 1,800 dozen shirts per week. In January 1981 - long before the union arrived on the scene - the company was forced to shut down one of these automated production lines which had the effect of cutting its production capacity almost in half. At that time, twenty-three employees were laid off. Only one employee, Tina Cabral, was recalled, and that was not until October, 1981. The second production line is still shut down.

65. Nor did business prospects improve in 1982. Production levels continued well below previous years. There were minor layoffs in February and March, 1982 - again, well before the efforts to rekindle the union's organizing campaign which were marked by the "kick-off" meeting at Lucinda Sousa's house on March 16th. The production levels from January to October, 1982 are set out on the following page:

Date	Dozens	Date	Dozens
Jan. 9	970	June 5	522
16	951	12	531
23	924	19	514
30	949	26	513
Feb. 6	965	July 3	390
13	862	10	518
20	761	17	500
27	894	24	532
March 6	540	31	(holiday)
13	597	August 7	(holiday)
20	623	14	394
27	585	21	571
layoff Apr. 3	546	28	711
10	360	Sept. 4	688
17	474	11	534
24	482	18	801
		25	779
May 1	471	Oct. 2	671
8	411	9	713
15	462	16	594
22	519		
29	457		

It will be observed that six months after the April 2nd layoff, the company's production levels were still generally below those attained in the weeks preceding the layoff.

66. To meet the shortage of work, Mrs. Abrantes was forced to "juggle the employees" from job to job in order to keep them as busy as possible. Such "juggling" was obvious to all of the employees and apparently a source of some friction. Even Tina Cabral, one of the employees laid off on April 2nd and a complainant in this matter, testified that she was not particularly surprised that there was another layoff. What surprised and disturbed her was the selection of the individuals to be laid off, since that group not only contained a number of prominent union supporters (six of the seven who had attended the union's "kick-off" meeting two weeks before), but also a number of skilled and senior employees whose layoff seemed to her to be unusual. This was precisely the same concern which Natalie Rocha felt at the time and later expressed to this Board. So did Cecilia Furtado.

67. Counsel for the union points out that the company did not tender any documentary or *viva voce* evidence concerning sales, inventories, orders to be dealt with, or shipping records. Mrs. Abrantes had no knowledge about these matters, nor was she very familiar with the production records which had been put in evidence. Without this additional information, the union argues, the production levels have little meaning, since it would be relatively easy to manipulate the level of production so as to precipitate or mask an unlawful layoff. Counsel for the union notes that as late as the morning of April 2nd, Mrs. Abrantes was telephoning certain laid off employees requesting them to return to work the following week. Why the sudden change in the course of a few hours?



68. According to Mrs. Abrantes, the decision to lay off employees was made by Barry Appleby, the owner, who had been out of the Country for two weeks and returned on April 2nd. Mrs. Abrantes said that Appleby told her to draw up a list of employees from whom the ones to be laid off would be selected. He then went out to see if he could "drum up" any last minute business. When he failed to do so, he decided that a lay off was necessary.

69. But Mr. Appleby – who made the ultimate decision to lay off – did not testify; so we really do not have any direct evidence as to his reasons for the timing of the layoff or the extent of the production cutback (the company had been operating at low levels of production for some time), or the company's financial position at the time, or Mr. Appleby's views, if any, on who should be laid off. Nor was Mrs. Abrantes very helpful since, she said, she knew nothing about sales (present or projected) or inventories, and simply implemented the layoff decision which Mr. Appleby had made. In the union's submission, Appleby's failure to testify is a fatal gap in the company's case, given the onus of explanation cast upon it.

70. We do not agree. Although we acknowledge the force of the union's argument that the company's evidence was not as complete as it might have been, in our view, it seems improbable that the company would have artificially manipulated its production levels, keeping them at a low level for months simply to mask an anti-union layoff. Moreover, we note that while a number of the individuals laid off may have been union supporters, some were not, and some did not actually join the union until after they were laid off. Where, as here, there had been minor layoffs in the weeks preceding April 2nd (and preceding the resurgence of the union's organizing campaign), and many employees were not fully occupied at the time of the layoff, we are not persuaded that the fact or timing of the layoff were motivated by anti-union considerations. The number and identity of the employees laid off, however, is another matter.

71. Even if, as we have found, the layoff itself was not illegal, the company must still demonstrate that the selection of the individuals to be laid off (or later recalled) was not influenced in any way by the fact that they were exercising rights under the Act. An employer cannot capitalize upon the occasion of a legitimate reduction in the work force to rid itself of union supporters. Here, then, the employer must affirmatively demonstrate that the selection of the persons to be laid off was not tainted in any way by the fact that they were, or were thought to be, union supporters. On this branch of the union's case we again have only the evidence of Mrs. Abrantes and that evidence is far from satisfactory.

72. We have already referred to certain of our concerns about Mrs. Abrantes' evidence, but given the importance which credibility plays in this case, this matter may perhaps warrant some further consideration.

73. As we have mentioned above, Mrs. Abrantes was much more forthcoming in her evidence-in-chief than in cross-examination. This was so in the case of her recollection about who had or had not turned in the trade union pamphlet. In direct testimony she listed a number of individuals in each category, but on cross she initially said that she could not recall anyone who had failed to turn in a leaflet. Such failure, of course, might prompt an inference that the individual was a union sympathizer and Mrs. Abrantes' response came in answer to a series of questions seeking a comparison between

the list of individuals who had not handed in pamphlets and those on her list of employees slated for layoff. Mrs. Abrantes said that she could not recall any of the names on either list – although presumably it must have included all of those who were actually laid off. Yet Mrs. Abrantes had already indicated the names of a number of employees (many subsequently laid off) who had not turned in a pamphlet.

74. This apparent failure of memory was even more evident as counsel for the union probed the extent of Mrs. Abrantes' knowledge of the union organizing campaign and its possible supporters. In her direct evidence she told the Board of the amusing (to her) incident concerning Ed Ziemba in September, 1981, when he had visited her home under the mistaken impression that she was a rank and file employee and had revealed that Maria Camara was a union supporter. Mrs. Abrantes asked Camara about it the next day and went on to describe for the Board an employee meeting chaired by Barry Revson, then the production manager, where the trade union was discussed. In cross-examination, however, she *twice* denied any knowledge of union organizing in the fall of 1981, and recanted only when reminded of her own earlier testimony. And she continued to deny that she had any knowledge that Camara was a union supporter. Indeed, she told the Board: no one had ever told her anything about the union; she had never talked to *anyone* about the union; she had no idea about who might be a trade union supporter; she drew no inferences about an employee's views from the failure to hand in a pamphlet; she really didn't know what a trade union was (although her husband has been in a trade union for fifteen years); she didn't know what the leaflet meant; and she was not disappointed in the least that certain employees had decided to join a trade union. Indeed, as late as December 9, 1982 – months after the commencement of these proceedings – Mrs. Abrantes asserted that she didn't know that the union was claiming that the layoff was unlawful! These statements are improbable and implausible apart altogether from Mrs. Abrantes' demeanour in the witness stand. Is it likely that she did not talk to anyone about the union – not even her son and daughter with whom she worked directly or the employees who initially approached her to tell her about the union?

75. Mrs. Abrantes did testify that shortly after the union meeting at Lucinda Sousa's house on March 16th, which marked the resurgence of the union's organizing campaign, she received a phone call from Filomena Paiva to advise her that the meeting had taken place. But, according to Abrantes, Paiva did not tell her who was at the meeting and Mrs. Abrantes did not ask – this from the individual who had earlier taken such pains to compile a list of those employees who were or were not prepared to hand in a piece of pro-union literature. It is understandable that an employee might be reluctant to reveal which of her fellow employees was a trade union supporter because of the fears or potential consequences mentioned above. But is it likely that having been informed of a union meeting, Mrs. Abrantes would not even ask who was involved?

76. Mrs. Abrantes also admitted that on one occasion during the final days of the union's organizing campaign, when its representatives were outside the employer's premises giving out leaflets, the employees were directed out the front door (and away from the union representatives) rather than through the employee entrance which they normally used. Mrs. Abrantes said that she had no idea that the union representatives were there. She had directed the work force to use the front door because of a broken light bulb at the employee entrance. The presence of the union organizers near the usual employee exit had nothing to do with her order. We do not believe it.

77. Having regard to Mrs. Abrantes' demeanour when giving her evidence, the inconsistencies noted, and the inherent improbability of portions of her testimony, we are not prepared to find that she was an entirely forthright candid or credible witness. This is not to say that all of her evidence was false or that all of it must be rejected; but the persistent denial that she had no discussion, knowledge, interest, concern, or curiosity about the union or its supporters is simply unworthy of belief. Given the statutory reverse onus and the fact that we are satisfied that portions of her evidence were false or misleading, it would be tempting to reject her evidence in its entirety, draw totally adverse inferences, and conclude that all of the individuals laid off on April 2nd were laid off because they were or were thought to be trade union supporters. But we do not think that this would be a fair conclusion to draw in respect of all aspects of her evidence or in respect of all of the persons laid off on April 2nd – however unsatisfactory certain of her testimony might be. In our view, the picture is more complicated than that, and just as our doubts about certain aspects of the union witnesses' evidence did not result in the total rejection of all of it, so too we have tried to discern and determine those aspects of Mrs. Abrantes' evidence which can be believed and those which can't. For it is obvious that, given the depth of the union's support, even a *bona fide* layoff would inevitably touch some union supporters and this result would be even more pronounced if Mrs. Abrantes were simply "playing favourites". In our view, her evidence should be considered in its entirety and in light of the other evidence before the Board. In so doing, of course, we have borne in mind the statutory onus of proof cast upon the employer under section 89(5) of the Act, and the onus of explanation arising from the particular circumstances of this case.

78. We have found it useful to look at the employees in two groups, beginning first with the six employees who attended the organization meeting at Lucinda Sousa's house and were later laid off. Those employees were: Ana Medeiros, Maria Camara, Zita Lima, Tina Cabral, Maria De Braga, and Lucinda Sousa herself. The only employee who attended the meeting but was not laid off is Maria Desousa, the coffee and cleaning woman who does not work in the production line with the others and who, it is interesting to note, was not approached by Mrs. Abrantes in connection with the trade union pamphlet. Moreover, despite Mrs. Abrantes' denial, we are satisfied that she was advised not only of the meeting, but of at least some of the individuals who were in attendance. With that in mind then, we now examine the reasons advanced for the layoff of these key union supporters, as well as the reasons for the failure to recall them. As of January 18, 1983, four of the six were still out of work.

79. Ana Medeiros was classified as a "spare girl", which means that she was capable of doing a number of different job functions and, because of her flexibility, earned a premium rate. She has been employed by the company for seven years and has never been laid off. Mrs. Abrantes, the forelady, concedes that Medeiros was a skilled and valued employee and that she (Abrantes) liked the way she worked. It is further conceded that Ana Medeiros is a much better packer than Rita Cidade, a less senior employee who was kept on, and that Medeiros is more flexible (i.e., could perform more job functions) than Cidade. Yet it was Medeiros who was laid off. Mrs. Abrantes told the Board that she did not need speed or someone who could do a variety of jobs, but one would have thought that precisely the opposite was the case. When reducing the work force it would be desirable to keep on persons who were flexible so that it would be easier to juggle the employees from job to job as she had been doing in the weeks preceding the layoff. Moreover, the advantages of flexibility were asserted as the reason



that a number of other employees had been kept on, yet, for some reason, flexibility was not important in the case of Ana Medeiros.

80. The trade union put before the Board a partial comparison of employee productivity, based upon an analysis of employee time cards over a sample period of fourteen weeks. In Medeiros' case, that analysis bears out Abrantes' evidence in that, as a packager, Medeiros' output per hour was thirty-seven per cent higher than that of Cidade. The union also pointed to an incident involving Medeiros which occurred about a week before her layoff and a week after the meeting at Lucinda Sousa's house. Medeiros had had a fainting spell and Abrantes was heard to remark cryptically: "that's what you get for getting involved in things like that" – a remark which those present took to be a reference to the trade union and which otherwise is difficult to explain.

81. On Friday, April 2nd, Abrantes called Medeiros to confirm that she would be returning to work (she had been off sick for a few days) the following week; but, a couple of hours later, for reasons which were really never adequately explained, that decision was reversed. In summary then, it is difficult to explain Medeiros' layoff on the basis of skill, ability, flexibility, or seniority. On any of those bases she should have been retained.

82. Maria Camara was also acknowledged to be a good worker and much faster than Isabel Gomes, the person whom Mrs. Abrantes said was retained in her place. Camara was told on April 2nd that she was being laid off *because* she was too fast and that the company didn't need speed. Abrantes testified before this Board that she had concerns about the quality of Camara's work, but those concerns had never been raised with Camara herself, and could not have been too significant because Camara had earlier been invited to work for a small firm run by Mrs. Abrantes herself from her home and known as Real Shirts. Lucinda Sousa worked for Mrs. Abrantes too. Mrs. Abrantes complained that Camara was being unduly critical and sending shirts back with only minor defects, but, in the next breath Abrantes complained that Sousa was passing faulty products. Her assertions were inconsistent and lacked credibility. Mrs. Abrantes testified (despite her earlier evidence confirming Ziemba's visit) that she had no idea Camara was a union supporter and would never have believed it.

83. At one time the company had two folder-packer teams: Isabel Gomes plus Susan Tackichand, and Camara plus Medeiros. The latter team was far better. On February 12, 1982, Tackichand was laid off – suggesting that at that time, prior to the trade union appearing on the scene, Tackichand was regarded as the least capable individual who should therefore be declared surplus first. But she was recalled in June *before both Camara and Medeiros*. Medeiros didn't return until September and Camara wasn't called back at all. And when Mrs. Abrantes testified that Tackichand had been recalled because she could do buttonholing, counsel for the union pointed out, and Mrs. Abrantes agreed, that so could De Braga – and better. Lucinda Sousa could also do a variety of jobs, including folding, buttons, and buttonholes, and she had more years of service than Tackichand, but she was not recalled either. Antonia Cruz escaped the April 2nd layoff. She was kept on to do folding and buttonholes. But Mrs. Abrantes conceded that she was much slower than Tina Cabral, Ana Medeiros, or Lucinda Sousa, all of whom were laid off.

84. We are prepared to accept that Abrantes did not find Tina Cabral to be an entirely satisfactory employee. But she was the only one who was recalled in 1981, and

she was not laid off in February or March, 1982. Mrs. Abrantes testified that Leonore Ferreira was a better employee, and perhaps she was. However, we are not convinced that this is the only reason why Cabral was laid off and not recalled. Like Camara, Cabral had not been criticized for the quality of her work and while Mrs. Abrantes initially testified that Cabral had made certain production errors in late March or April prior to her layoff, when pressed, she was forced to admit that Cabral was not responsible. N. Viveiros was laid off on March 3rd, when Cabral was kept on, yet Viveiros was recalled first on June 14th to do a job which she had never done before but on which Cabral had previous experience.

85. On the day of the layoff itself, the employees were given to understand that they would be recalled when work picked up. Some of them were, but by the fall of 1982, a number of employees – most particularly several individuals who had been present in the hearing room or given evidence against the respondent company – were still out of work. Further, in September, 1982, the company hired three brand new employees who had recently arrived from Portugal and who had no experience in the business whatsoever. It is acknowledged that the persons on layoff could do the jobs of all three new hires, but none of them were offered such jobs. Mrs. Abrantes testified that when it became apparent that more production would be required and more employees necessary, the company's consulting engineer advised her to hire experienced employees. She also testified that she always tried to recall the older employees if available. Yet these senior former employees who, incidentally, were union supporters, were not recalled. Mrs. Abrantes testified that she never even considered doing so even though they were fully capable of doing the work.

86. We do not think it is necessary to multiply the number of examples. It suffices to say that we were not persuaded on the evidence that the layoff of these six individuals could be explained by reference to their seniority, skills, ability, flexibility, value to the business, or any *bona fide* business reason. Mrs. Abrantes' explanations simply did not ring true and we choose not to believe them. On the basis of the evidence before us, we are not satisfied that either their layoff or the delay in recalling them were devoid of anti-union considerations. We find, therefore, that in respect of Ana Medeiros, Maria Camara, Zita Lima, Tina Cabral, Maria De Braga, and Lucinda Sousa, their layoff constitutes a breach of sections, 64, 66 and 71 of the *Labour Relations Act*. Accordingly, the company is directed to forthwith reinstate the four employees who are still on layoff (Tina Cabral, Lucinda Sousa, Maria Camara, and Maria De Braga) and compensate all six employees for all wages and benefits lost, with interest, as a result of their unlawful layoff. Such compensation shall be calculated in accordance with the usual rules respecting mitigation.

87. On the other hand, different considerations apply to the remaining complainants identified on Schedule "A" to the union's unfair labour practice complaint.

88. Emilia Bettencourt is undoubtedly a senior and skilled employee who supported the union and was laid off on April 2nd. However, Mrs. Bettencourt was initially laid off on March 12th – before the resurgence of the union's organizing campaign and well before she indicated any personal interest in the union. This suggests that the layoff on March 12th was not motivated by anti-union considerations, moreover, a week before that Mrs. Abrantes told Bettencourt that there was very little work for her and that she should be looking for an alternative job. When Bettencourt protested that

the younger ones should be laid off first, Abrantes replied that Filomena Paiva could do more jobs. The union's "efficiency chart" reveals that she was less productive than either of the two individuals with whom she was compared and the evidence discloses that she was something of a complainer who was reticent about trying jobs which she had not done before – in marked contrast to Filomena Paiva, whom Mrs. Abrantes preferred and who was much more flexible. Mrs. Bettencourt joined the union on March 24th, but, by her own evidence, did not advertise the fact; nor is it clear from the evidence whether she did or did not give in a leaflet. It appears that she was at home while Mrs. Abrantes was pursuing this enquiry. Mrs. Bettencourt did not attend the union's organizing meeting, nor is there any evidence that she was unusually vocal or an advocate of the union's cause. In other words, her layoff appears to be perfectly justifiable on the basis of *bona fide* business considerations and there does not seem to be any reason why her mere membership in the union would have been known to Abrantes or played a part in it. On the contrary, it appears that in the case of Mrs. Bettencourt, her employment position was tenuous even before the union came on the scene.

89. Much the same can be said of the other complainants appearing on Schedule "A". Some of them, like Mrs. Bettencourt, were union supporters, but at the time of their layoff others had not yet signed for the union and one never did so. Tina Cabral said that she knew that a number of the employees laid off on April 2nd had not signed for the union, and if Cabral was unaware of their views, there is no reason to believe that the employer knew. None of these individuals were prominent union supporters, nor, in the case of those who had signed for the union, is there anything which would make them stand out from the many union supporters who were not laid off. Many had failed to turn in a pamphlet to Mrs. Abrantes, but some had done so yet were still laid off. And in the case of all of these employees, Mrs. Abrantes was able to give a fairly plausible explanation for both their layoff and recall connected to the particular functions which they performed and the changing product mix experienced by the company as it began to try to fill its summer orders. For example, it was unnecessary to retain individuals (like Bettencourt) to stitch the cuffs of shirts when the company switched over to its short sleeve summer styles which, of course, had no cuffs.

90. There is no doubt that there was a reasonable suspicion concerning the layoff of these employees and that their fellow employees who were not laid off could harbour a reasonable belief that the layoff was motivated by anti-union considerations. Indeed, the Board has had to wrestle with precisely that allegation, given our view that in the case of at least some of those laid off, there was an anti-union element. On the basis of the evidence before us, however, we are persuaded that, except as noted above, the unfair labour practice complaints should be dismissed.

91. Nevertheless, given the unfair labour practice finding in respect of a number of employees, and given the chilling effect which, on the evidence, this unfair labour practice had on those who were not laid off, the Board further directs that the respondent employer post copies of the attached Notice marked "Appendix" after being duly signed by Barry Appleby, the owner of the company, in conspicuous places at its place of business where the notices will most likely come to the attention of bargaining unit employees. Such notices are to be kept posted for sixty consecutive working days from the date of the release of this decision. Reasonable steps shall be taken by the company to ensure that the notices are not altered, defaced, or covered by any other material. In addition,



reasonable access to the premises shall be given by the respondent company to two representatives of the complainant union so that they may satisfy themselves that this posting requirement has been and is being complied with.

### *THE STATUTORY FREEZE ISSUE*

92. Section 79 of the *Labour Relations Act* – the so-called statutory freeze – prohibits any alteration of the terms and conditions of employment or the rights, privileges, or duties of the employees while a certification application is pending before the Board. In essence, section 79 preserves the employer-employee status quo, or, as the Board has put it in previous cases, that the employer must carry on “business as usual” without regard to the pending certification application. But, in this case, we do not think any useful purpose would be served in reviewing the Board’s jurisprudence on the ambit or depth of the freeze. Here it is clear that as styles have been changed or phased out and new styles introduced, piecework rates have been altered accordingly, and we are not convinced on the evidence before us that these changes depart from the “business as usual” basis which the Board has ruled underlines section 79. This aspect of the union’s unfair labour practice complaint must also be dismissed.

93. For the foregoing reasons then, a certificate will issue to the applicant trade union and its unfair labour practice complaint is granted in part and dismissed in part.

### **DECISION OF BOARD MEMBER F. W. MURRAY;**

1. I dissent.

2. While I agree with the majority findings with respect to the layoffs of six employees as constituting a breach of sections 64, 66, and 71 of the *Labour Relations Act*, I do not agree with the Board’s findings with respect to the petition.

3. Further, with respect to the unfair labour practices, in the absence of a collective agreement specifying seniority as a major factor in considering layoffs, I would be prepared to accept the fact that the layoff selection of individuals to be laid off was hardly a model of rationality. I would also be prepared to accept that a forelady in a small operation would be influenced by many subjective factors, and indeed even favouritism. However, Mrs. Abrantes’ testimony dealing with the abilities of those that she laid off as opposed to the abilities of those that took over their tasks would certainly not inspire one with the notion that she was concerned with productivity, a factor I would have thought would be of the utmost importance in making such decisions.

4. I therefore have concluded that the company failed to meet the onus required under section 89(5) of the Act.

5. In the case of the petition, I am troubled by the majority’s reliance on the familial relationship between the forelady and certain individuals involved in circulating the petition. I would not, in today’s society, so readily identify offspring with the views of their elders. Moreover, the evidence indicated that members of the same family did not necessarily share the same views with respect to support for the union. In my view, when

given the opportunity in cross-examination, Mr. Rodrigues was able to satisfactorily explain any problems or inconsistencies arising out of his initial testimony.

6. It would seem to me that if any employees viewed Mr. Rodrigues or others as a friend or tool of management, or, indeed, if they felt that the layoff selection by Mrs. Abrantes was unfair, the most effective way of retaliating against such activity would be to exercise their secret ballot and vote in favour of the applicant trade union. I cannot think of a more effective way to anonymously lash back at an employer who any one, for any reason, feels has been unfair.

7. I would have found, in light of all of the evidence, that the best way to determine the true wishes of the employees would be to order the taking of a secret ballot.

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**Appendix**  
**The Labour Relations Act**  
**NOTICE TO EMPLOYEES**  
**Posted by Order of the Ontario Labour Relations Board**

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A SERIES OF HEARINGS ARISING OUT OF THE EFFORTS OF THE INTERNATIONAL LADIES GARMENT WORKERS' UNION TO BECOME THE BARGAINING REPRESENTATIVE FOR OUR EMPLOYEES. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY INTERFERING WITH THE RIGHTS OF OUR EMPLOYEES TO SELECT AND BE REPRESENTED BY THE UNION OF THEIR CHOICE.

THE ONTARIO LABOUR RELATIONS ACT GUARANTEES THAT IN THE PROVINCE OF ONTARIO ALL EMPLOYEES HAVE THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM OR JOIN OR PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION,

TO ACT TOGETHER FOR THE PURPOSE OF COLLECTIVE BARGAINING.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS WHICH ALL EMPLOYEES ENJOY.

WE WILL NOT DISCRIMINATE AGAINST ANY OF OUR EMPLOYEES BECAUSE THEY SUPPORT THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, OR BECAUSE THEY WANT THAT UNION TO REPRESENT THEM.

WE WILL IMMEDIATELY REINSTATE THE FOLLOWING PERSONS WHOM THE ONTARIO LABOUR RELATIONS BOARD FOUND WERE IMPROPERLY LAID OFF: TINA CABRAL, MARIA CAMARA, MARIA DE BRAGA AND LUCINDA SOUSA.

WE WILL COMPENSATE THESE FOUR EMPLOYEES AS WELL AS ANA MEDEIROS AND ZITA LIMA FOR ALL EARNINGS THEY HAVE LOST AS A RESULT OF OUR DISCRIMINATION AGAINST THEM, PLUS INTEREST.

SINCE THE UNION IS NOW CERTIFIED AS THE REPRESENTATIVE OF THE EMPLOYEES WE WILL MEET THE UNION AND BARGAIN IN GOOD FAITH AND MAKE EVERY REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT.

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APPLE BEE SHIRTS LIMITED  
PER: (GARY APPLEBY)

**This is an official notice of the Board and must not be removed or defaced.**

**This notice must remain posted for 60 consecutive working days.**

DATED this 27<sup>TH</sup> day of JUNE, 19 83.





**0324-83-R** Pamela Nadine Stewart, Mary John Gow, Shirley Emma Campbell, Donna Jean Whitehead, Phyllis Isabel McNeil and Margaret Edith Lyle, v. Applicants, v. The Ontario Nurses' Association, Respondent, v. **The Bobier Convalescent Home**, Intervener

Hospital Labour Disputes Arbitration Act - Termination - Timeliness - Conciliation concluded and interest dispute referred to arbitration - No collective agreement at time of termination application - After appointment of conciliation officer termination timely in hospitals only during open period of collective agreement - Application dismissed without hearing as untimely

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members John W. Murray and W. F. Rutherford.

### **DECISION OF THE BOARD;** June 10, 1983

1. This is an application which was filed on May 6, 1983, pursuant to section 57 of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.

2. The respondent filed a reply to the application in which it submitted that the Board lacked jurisdiction to hear the matter because the application was untimely pursuant to section 12 of the *Hospital Labour Disputes Arbitration Act* and section 57 of the *Labour Relations Act*.

3. The respondent was certified as the bargaining agent for certain employees of the applicants' employer on June 1, 1981. It is not disputed that the employer of the applicants is a hospital within the meaning of the *Hospital Labour Disputes Arbitration Act*, and it is a matter of record that no collective agreement has been entered into by the employer of the applicants with the trade union. The respondent applied for conciliation under the *Labour Relations Act* on March 11, 1982, a conciliation meeting was held on April 30, 1982, and the Minister of Labour issued a notice on May 14, 1982 that the conciliation officer was unable to effect a collective agreement pursuant to section 3 of the *Hospital Labour Disputes Arbitration Act*. Pursuant to the provisions of that Act, the matter has now been referred to arbitration which is scheduled to occur on June 14, 1983.

4. It is clear from the progress of bargaining between the respondent and the applicants' employer that following certification, no collective agreement, as of the time the application under section 57 was made by the applicants, had been entered into, and that prior to the filing of that application, a conciliation officer had been appointed.

5. The timeliness of an application for a declaration terminating bargaining rights by these applicants is dependent upon sections 57 and 61 of the *Labour Relations Act*, and in this case, on section 12 of the *Hospital Labour Disputes Arbitration Act*. An application by employees of a hospital for a declaration terminating a trade union's bargaining rights after certification and after a conciliation officer has been appointed can only be made during the "open period" of a collective agreement. Under the *Hospital Labour Disputes Arbitration Act* since there can be no strikes or lockouts and collective

bargaining disputes must be referred to arbitration, a collective agreement will eventually be created, if not by the parties themselves, then by the arbitrator under the Act.

6. The timeliness of applications of this type has been dealt with by the Board in *Birchcliff Nursing Home*, [1975] OLRB Rep. April 384, where the Board at page 386 wrote:

“The entitlement to apply under section 53(1) [now 61(1)] of the *Labour Relations Act* for a declaration terminating bargaining rights following certification, and before a collective agreement is concluded, is quite different. Under section 53(1) such an application may be made following the exhaustion of conciliation procedures –more precisely, after conciliation has been concluded and the time limits stipulated under sections 53(1) (a), (b) or (c), as the case may be, have elapsed. However, in the case of a “hospital” within the meaning of the *Hospital Labour Disputes Arbitration Act*, where the right to strike (or lock out) has been replaced by compulsory arbitration, the appointment of a conciliation officer operates to bar an application for termination until the conditions stipulated in section 49(2) [now 57(2)] of the *Labour Relations Act* have been met: i.e., until a collective agreement has been concluded, and then only within the open period (as set out in sections 49(2) (a), (b) or (c), as the case may be) of that collective agreement.”

See also *Nel-Gor Castle Nursing Home*, [1979] OLRB Rep. Oct. 1013 at 1015.

7. Under the provisions of Rule 71 of the Board’s Rules of Procedure, the Board is permitted to dismiss an application without a hearing, where, in the opinion of the Board, the application does not make out a prima facie case for the remedy requested. In this case, having regard to the facts as outlined above, and to the relevant provisions of the *Labour Relations Act* and the *Hospital Labour Disputes Arbitration Act*, this application is clearly untimely. Accordingly, pursuant to our authority under Rule 71 we hereby dismiss this application without a hearing. Therefore, the hearing scheduled for June 14, 1983, is cancelled.

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**1333-82-U Phillip Wayne Bradley**, Complainant, Canadian Paperworkers Union, Local 212, Respondent

**Duty of Fair Representation - Practice and Procedure - Reconsideration - Remedies**  
 - Prior Board decision finding breach of Act by union - Directing union to refer complainants grievance to arbitration - Complainant's request to direct retention of independent legal counsel considered and denied - Board remaining seized in event of questions relating to implementation  
 - Complainant's subsequent letter requesting direction to retain independent counsel not raising matter of "implementation" - Failing even if treated as requested for reconsideration

**BEFORE:** Corinne F. Murray, Vice-Chairman.

*APPEARANCES: Michael Bendel and Phillip Wayne Bradley for the complainant; J. James Nyman and W. Oliver for the respondent.*

**DECISION OF THE BOARD;** June 8, 1983

1. This decision arises from a letter dated April 15, 1983 received from counsel for Mr. Bradley wherein the complainant applied for "a resolution" of "the dispute over the interpretation or implementation of its Order" dated March 17, 1983. In that order, among other things, the Board ordered that the respondent forthwith submit the matter of Mr. Bradley's discharge to arbitration for a hearing on its merits. The order was made to remedy a breach of section 68 of the Act found to have occurred because of certain arbitrary acts of an official of the respondent. The facts supportive of this conclusion are set out in the decision containing the above-noted order (now reported at [1983] OLRB Rep. Mar. 323) and need not be repeated here in totality. A few aspects of the March 17, 1983 decision bear mentioning however. It was not argued by the complainant at the original hearing in this matter that any bad faith, malice or ill will motivated or lay behind the respondent's treatment of Mr. Bradley's discharge. The Board did not find any personal ill will was borne toward Mr. Bradley by the relevant union official or anyone else appearing before us in the original hearing. In this connection the Board found at paragraph 25:

25. In order to provide "arbitrariness", it is not necessary to show that there was subjective ill will. The Board has in other cases found arbitrariness where the union has taken a totally unresponsive position (see the analysis of the meaning of "arbitrary" in section 68 in *C.U.P.E. Local 1000*, [1975] OLRB Rep. May 444, at page 462), or has totally ignored the merits of a complaint (see *I.A.W. Local 2-700*, [1972] OLRB Rep. Oct. 916)). Mr. Poirier believed that section 4(b) [of the collective agreement] released him and the respondent from any obligation to consider representing Mr. Bradley using the normal channels of the grievance procedure and eliminated Mr. Bradley's right to file a grievance of his own. Assuming, without finding, that section 4(b) [of the collective agreement] indeed meant that, I find that Mr. Poirier conducted himself in an arbitrary manner. One of the most fundamental ways in which a trade union represents bargaining unit members is through negotiation of a grievance procedure and through the participation of its officials in some or all of the steps in the grievance procedure. The respondent in this case negotiated a

grievance procedure accessible to all bargaining unit members and did not negotiate a clause excluding probationary employees from the substantive right of having their discharge or suspensions subject to the standards set out in the Mill Rules. But in the same collective agreement the respondent stipulated, through section 4(b) [of the collective agreement], that it would not represent probationary employees who have been discharged. This stipulation, in the context of this collective agreement, is an arbitrary one because it sanctions an unresponsiveness and the total ignoring of the merits of a probationary employee's discharge simply because he/she is probationary. Without any explanation as to why probationary employees should not be represented by the respondent when they are discharged or why the merits of their discharge should not be considered, I must conclude that the respondent has arbitrarily abdicated its duty to represent Mr. Bradley because he was a probationary employee.

2. Counsel for the complainants in his letter of April 15, 1983, described the dispute over the "interpretation or implementation" of the Board's order as follows:

The dispute relates to Mr. Bradley's representation before the arbitration board. Mr. Bradley seeks to be represented by a lawyer of his own choosing, with legal fees being paid by the Respondent union, whereas the Respondent union has offered him the services of a union representative.

3. The request that the complainant be represented by a lawyer of his own choosing with legal fees paid by the respondent was made by the complainant before the Board at the original day's hearing. The Board did not grant that request. The complainant properly interpreted the Board's order as implicitly rejecting this request. The Board has stated on numerous occasions that success in proving that section 68 has been breached does not automatically confer on the complainant the right to have his grievance arbitrated (see, for example *Massey-Ferguson*, [1977] OLRB Rep. April 216; *Bedard Gerard*, [1981] OLRB Rep. Oct. 1338). Where the Board does grant such remedy, it does not always make an order as to representation at such arbitration. The Board has normally specified who must represent the grievor at an arbitration it directs, as a result of a section 68 proceeding, where there are ongoing serious concerns that the complainant will not receive a non-arbitrary, non-discriminatory, good faith treatment by the respondent in the course of its presentation of the arbitration (see, for example, *Leonard Murphy*, [1977] OLRB Rep. March 146, the first reported decision where such an order is made). When the Board has made an order concerning representation at arbitration, the nature of the order has been that the union and the grievor *jointly* select a lawyer to handle their presentation (see *Leonard Murphy*, *supra*; *Bedard Gerard*, *supra*). In the *Leonard Murphy* decision, (*supra*), the Board ordered that jointly selected counsel present the case at arbitration because the union officials had twice failed to fulfill their duty under section 68, that relatives of these officials had been hired as replacements for the discharged grievors and that the bad faith operative within the relevant union officials eclipsed the complainants' individual rights. In the *Bedard Gerard* decision, *supra*, the union had actively thwarted the grievances of the complainant even to the point of improperly writing up a grievance so that the grievor's real complaint was not set out. No

order as to representation was made on the facts in the case before me because the nature of the union's actions were not comparable to these decision nor raised similar concerns regarding the respondent's ability to represent the grievor's interests at arbitration without violating section 68. There was no evidence presented to me which led me to conclude that an order directing legal representation, either jointly or exclusively chosen by the complainant, was warranted. An order for separate, independently selected legal counsel would be highly extraordinary. A remedy under section 68 should not change the essential character of the arbitration process. The respondent is the party to the collective agreement and the arbitration not the grievor (*General Motors of Canada v. Brunet*, [1977] 2 S.C.R. 537) and would have, except for a violation of section 68, had exclusive selection over whether the arbitration was to proceed and how. The interests of a bargaining agent and the grievor are united before an arbitration board. Jointly selected counsel has been ordered only where the Board feels there would be no truly united representation of the arbitration case for the respondent and the grievor. The joint selection process is to ensure that this unity is restored. The *exclusive* selection of legal counsel would effectively remove the essential unity of the grievor's and union's interests at arbitration.

4. In response to the complainant's letter of April 15, 1983, the Board directed a "continuation of the hearing" into this file on May 30, 1983. Counsel for the respondent indicated by letter dated May 13, 1983, that he was objecting to the Board's jurisdiction to entertain the complainant's request because the relief requested in the April 15, 1983 letter would necessitate the issuance of further and additional remedies not referred to in the Board's decision.

5. On May 30, 1983, the Board sat in Ottawa to hear the representation of the parties. For the first time representatives of the former employer of the complainant, Domtar Fine Papers Inc., were present. The employer was not made party to the proceedings at this stage because the argument regarding the appointment of counsel to represent the complainant did not raise any matters impacting on its interests. The representatives of the employer did not object to this.

6. The complainant's counsel in describing the position of the complainant specifically denied he was seeking reconsideration of the original award. He also candidly admitted that he did not see the "dispute" that had arisen between the parties as creating a fresh section 68 complaint. Finally, he refined his argument so that the argument was simply that the dispute involved was over the implementation of the order, not its interpretation. He indicated he clearly understood the order to have implicitly rejected the original request for independent legal counsel.

7. Some evidence was presented upon which the parties based their arguments. The respondent objected to a portion of it because it was only relevant to a fresh complaint as to the quality of representation not to a decision as to whether there was a dispute regarding implementation of the order. The evidence (including the portion to which objection was made) may be briefly stated. Following issuing of the Board's order, counsel for the complainant orally requested that the respondent agree to have him as counsel at the arbitration directed. He also requested that he be kept informed of the proceedings. Pursuant to that request, the respondent informed him and/or the complainant by letter as to the arbitration board's composition and the arranged hearing date (June 15, 1983). The complainant's counsel in writing reiterated his request that he



represent Mr. Bradley (and, presumably, the respondent) at the arbitration hearing, and that the cost of his services were to be paid by the respondent. These were the facts which initially both counsel before me indicated were necessary for me to know in order to consider their representations. Later on counsel for the complainant acknowledged he made a mistake in this judgement call and was allowed to introduce the following evidence through the sworn testimony of Mr. Bradley, subject to the respondent's objection. At the same time as he was informed of the date of the arbitration, Mr. Bradley was informed by letter that the person who would be presenting his case would be Wilfred Oliver who was the respondent's counsel at the original meeting. Essentially, Mr. Bradley testified that he was dissatisfied with Mr. Oliver's preparation of the case for arbitration. He felt Mr. Oliver was not spending enough time on the preparation. He felt that if Domtar had lawyers, he should have the equivalent (there is no dispute that Mr. Oliver is not a lawyer but that he handles *all* of the respondent's arbitrations). Mr. Bradley did not feel Mr. Oliver was treating him any different than any other grievor. Mr. Bradley's complaint vis-a-vis Mr. Oliver lay in the adequacy of preparation and his skills as compared to "a lawyer". Mr. Bradley acknowledged that virtually all the facts to do with his discharge were canvassed at the Board's original hearing. However, even though Mr. Oliver's participation in the original proceedings would make him familiar with the facts regarding his discharge, Mr. Bradley felt he would not know the facts of "other witnesses". Mr. Bradley could not deny in cross-examination that Mr. Oliver, unbeknownst to him, could have met with other potential witnesses.

8. A summary of the complainant's argument is that the appointment of Mr. Oliver to represent Mr. Bradley raises a dispute about the "implementation" of the award. It was something that could not have been foreseen and the insertion of paragraph 30, which states that the Board will remain seized should there be a dispute as to the interpretation or implementation of the order, was to deal with the unforeseeable. Before me the complainant argued that *jointly appointed counsel* would be acceptable to the complainant. But it must be a lawyer. The main reason (which appeared in fact to be the sole reason) is because Mr. Oliver had before this Board been in an "adversarial position" vis-a-vis Mr. Bradley's interest. Since Mr. Oliver is not a lawyer, the complainant claims he cannot now, after having been "an adversary", thoroughly present Mr. Bradley's position with vigor. This is especially true when the statements made by Mr. Oliver at the original hearing are recalled, i.e., statements to the effect that the company probably had good cause for termination. The selection of Mr. Oliver as counsel for the arbitration is surprising to the complainant in view of this "history". It would be impossible for Mr. Oliver, a so-called "layman", to change positions now and become an advocate of Mr. Bradley, because the fact that Mr. Oliver was not a lawyer made him unaccustomed to arguing on opposite sides on different occasions and because Mr. Oliver "believed" the arguments he made before the Board as summarized at paragraph 21 of the original decision. When asked what position the complainant would have taken if another union official (non-lawyer) had been appointed as counsel, the complainant submitted that his position would depend on whether he had "confidence" in that person.

9. The respondent strenuously disagrees that the facts raise a question of implementation. If anything, they made a fresh section 68 complaint regarding the quality of representation by the respondent of Mr. Bradley's interests. If it is a fresh section 68, then the complainant ought not to be permitted to raise these matters in these proceedings in this fashion because the "complaint" touches significant issues of whether the respondent must appoint legally trained counsel or whether the general practice of

not appointing such persons is sufficient to rebut a charge of arbitrariness, bad faith or discrimination. He argued that the order granted leaves the Board *functus officio* insofar as resurrecting a requested but refused remedy is concerned. Although counsel could find no Board decisions on this point, he cited numerous arbitration decisions and Court decisions which indicate that the question of whether a body of limited statutory authority is *functus* in connection with a particular case is a question of fact. Since the remedy now sought was requested, argued and not granted, it cannot be re-litigated under the guise of "implementation". If this is not a fresh section 68, the respondent contended that the only way the complainant could succeed is via reconsideration. Even if the complainant had decided his application was a reconsideration, the Board would not grant such a request because the remedy was raised and argued at the original hearing and, therefore, does not satisfy the Board's own requirements for reconsideration. There is no reason to believe that Mr. Oliver, whose job it is to represent grievors and the respondent at arbitration, will not do his job in accordance with the Board's order and the duty he and the respondent have under section 68. The fact that he is not a lawyer does not mean that he is incapable of fulfilling both the Board's order and the requirements of section 68 merely because he represented only the respondent's interests in the original hearing of this matter.

10. Subsections (1) and (3) of section 106 of the *Labour Relations Act* set out the scope of the Board's decision-making powers:

106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

(3) Where the Board has authorized the chairman or a vice-chairman to make an inquiry under clause 103(2)(h), his findings and conclusions on facts are final and conclusive for all purposes, but nevertheless he may, if he considers it advisable to do so, reconsider his findings and conclusions on facts and vary or revoke any such finding or conclusion.

What these subsections mean is that where everything has been decided in a matter, the only way the Board has jurisdiction to consider the matters finally decided is through its powers of reconsideration. It has been established that the power to reconsider is an "independent plenary power" (*Labour Relations Board of British Columbia et al. v. Oliver Co-operative Growers Exchange and Okanagan Federated Shippers Association*, [1963] S.C.R. 7 (S.C.C.); *Bakery & Confectionery Workers Int'l Union of America, Local 468 v. Salmi et al.*; *White Lunch Ltd. v. Labour Relations Board of British Columbia*, [1966] S.C.R. 282 (S.C.C.)). However, in exercising its powers to reconsider, the Board has been careful not to undermine the finality of its decisions. The underlying rationale behind maintaining the finality of the Board's decisions was set out in *The Detroit River Construction Ltd.* case, 63 CLLC ¶16,260:

“ ... While depending upon the circumstances of the case and the applicable principles of natural justice, the Board ought not to be as strict or as technical as a Court, it must nevertheless, in our view, recognize the necessity for and apply some principle of finality to its decision. It stands to reason that when a party has gone through the ordeal, expense and inconvenience of a hearing and obtained a decision in his favour, that he should not be deprived of the benefit of that decision except for good cause. ... If it were otherwise, the door would be open in any given case to ceaseless and never-ending hearings each serving as a prelude to the next *ad infinitum* and no one could ever safely rely on any decision as finally settling the rights of the parties.”

In the *Journal Publishing Company of Ottawa Ltd.* decision, [1977] OLRB Rep. Sept. 549, the Board stated the two main reasons for the requirement of finality, at paragraph 6:

... The first reason is to protect the interests of those who have relied upon the Board's decision. The reliance interest is perhaps most important in those cases where the Board's decision has the effect of conferring or withdrawing bargaining rights. In such cases, where representation rights are in issue, the need for certainty and finality becomes obvious. A second reason, and perhaps no less important, is to protect the integrity of the Board's own processes. These processes must be protected from parties who, under the guise of reconsideration, are merely seeking to repair, or reargue, a lost case.

The usual ground which must be shown by a party requesting reconsideration is that there is new evidence or argument which could not, with reasonable diligence, have been discovered prior to the original hearing, which new evidence will make a substantial difference to the outcome of the case (see *K Mart Canada Limited*, [1981] OLRB Rep. Feb. 185 and cases cited therein). This ground clearly is retrospective because the evidence which could not have been discovered or adduced must have been in existence at the time of the initial proceedings. This ground is essentially the same as that required by the Courts to reopen a decided *lis*. While this is the most usual basis for reconsideration, it is not the only ground upon which the Board will reconsider a decision, order, declaration. In *Canac Shock Absorbers*, [1974] OLRB Rep. March 131, Appl. for Jud. Rev. dismissed S.C.O. (Div. Ct.) Oct. 23, 1974 unreported, the Board reconsidered and clarified an order it had made because “cogent and compelling reasons” had been shown. The reasons were the fact that the case was one of first instance, there had already been protracted proceedings, and a proliferation of proceedings could occur if the Board did not use its powers of reconsideration. In *The Journal Publishing Company of Ottawa Ltd.*, supra, the Board decided to exercise its jurisdiction to hear a reconsideration application where the evidence the applicant wished to lead was regarding events *subsequent* to the Board's order which events showed the Board's order should be varied. Ultimately, however, the Board decided to reject the request for reconsideration in the circumstances of that case. It is arguable that the Board, endowed with such broad powers of reconsideration (which can occur even on the Board's own motion) need not specifically “retain” jurisdiction in its decisions. (See *R. v. Ontario Labour Relations Board, Exp. Genaire Ltd.*, [1958] O.R. 637 (Ont. H.C.); *aff'd* [1959]



O.W.N. 149 (Ont. C.A.)). Be that as it may, a distinction ought to be made between a retainer of the Board's jurisdiction over a matter and a reconsideration. The retainer of jurisdiction indicates that all aspects of the decision or order are not final and that if something arises within the scope of the unfinalized, a party may apply to have that aspect finalized. Where everything is finally determined, only the plenary power of reconsideration may be invoked to deal with the same matter.

11. By paragraph 20 of the March 17, 1983 decision the Board retained jurisdiction over any disputes arising from the interpretation or implementation of the order. This is a retention of jurisdiction which the Board often makes to allow parties to return to the panel to work out details of the order which were not foreseen or argued and to avoid expensive, time-consuming and perhaps counter-productive resort to harsh enforcement mechanisms of prosecution or contempt proceedings. It also expedites the initial hearing by eliminating the necessity of the parties adducing evidence and making submissions concerning matters such as quantum of compensation which can generally be resolved by the parties without the assistance of the Board. The question raised by the arguments described above is where implementation ends and reconsideration or a fresh complaint begins.

12. Having carefully considered the evidence and representations of the complainant, I have determined that they do not raise matters of "implementation" in the sense intended by that term. The implementation of the order deals with the subsidiary *details* of implementation, such as the speed indicated by the word "forthwith", whether the arbitration must be by a three person board or by a sole arbitrator. It does not extend to the resurrection of a remedy already sought and not granted. The complainant's request for legal counsel was originally considered and not ordered. That is the end of the matter insofar as this section 68 complaint is concerned because the decision not granting independent legal counsel is "final". The only way in which the complainant could be successful in obtaining a change to this decision would be by way of an application for reconsideration. The complainant did not frame its argument in those terms; the complainant relied solely on the contention that the Board had retained sufficient jurisdiction from its original section 68 complaint to deal with the issue of the nature of the representation before the arbitration scheduled pursuant to the Board's order. However, even if the complainant had argued the request for legal counsel paid by the respondent on the basis of reconsideration, reconsideration would not have been granted because there is no evidence which has persuaded me that the refusal of the original request is wrong or should be changed and that the plenary power of reconsideration should be exercised in this case. It is not apparent from either the fact that Mr. Oliver is not a lawyer nor that he was counsel in the previous proceedings where he represented the respondent that he will not fulfill his legal responsibilities to the complainant at the arbitration hearing. In any event, the complainant has the continuing protection of section 68 of the Act, and Mr. Oliver (as an official of the respondent) continues to be under the duty set out in section 68 of the Act to refrain from acting in a manner that is arbitrary, discriminatory or in bad faith in the representation of the complainant in the arbitration proceeding, which duty is enforceable in the normal way under section 89.

13. Accordingly, the remedy requested by the complainant in its letter of April 15, 1983, and before me on May 30, 1983, is refused.

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**0197-83-R; 0198-83-U** United Food and Commercial Workers' International Union, Local 175, Applicant/Complainant, v. **Canadian Pizza Co. Ltd.**, Respondent

**Certification Where Act Contravened - Practice and Procedure - Unfair Labour Practice - Certification without vote sought - Union relying on unfair labour practices triggering reverse onus - Whether respondent required to proceed first - Test whether primary focus of case relating allegations triggering reverse onus - Board following Board's approach in *Domtar Packaging***

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members W. H. Wightman and B. Lee.

**APPEARANCES:** *Harold F. Caley, Dave Watson Frank Kelly and John Hurley for the applicant complainant; C. M. McKeown, Q.C. and Anelli Jalvila for the respondent.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN, AND BOARD MEMBER B. LEE; June 15, 1983

1. This is an application for certification in which section 8 of the Act is relied upon and in addition a complaint under section 89 of the Act alleging violation of sections 3, 64, 66 and 70 of the Act.

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3. The Board directs that the above application/complaint be and the same are hereby consolidated.

4. The parties were in dispute at the outset as to who should proceed first. The union, citing *Domtar Packaging*, [1982] OLRB Rep. July 993, argued that the respondent should be directed to proceed first as it would in any complaint alleging a breach of the *Labour Relations Act* which triggers the reverse onus provisions of section 89(5) of the Act. The applicant union argues that where the primary issue in a section 8 application is the establishment of the breach of the Act, where the question as to whether the true wishes of the employees can be ascertained relates directly to the seriousness of that breach and where the evidence with respect to membership support is already before the Board in the form of membership documents, the Board should require the respondent, as the party bearing the onus with respect to the alleged violation of the Act, to proceed first. The respondent employer takes the position that where there is mixed onus, as in this case, and where the applicant has gained an expedited hearing with respect to the alleged violations of the Act by proceeding under section 8, it should be required to proceed first.

5. We state at the outset that regardless of who proceeds first the legal burden with respect to the different issues before us does not change. We are concerned here with a procedural matter. The Board has consistently required the applicant trade union to proceed first in an application for certification in which section 8 of the Act is relied upon. The Board has done so regardless of whether or not the application for certification is consolidated with a section 89 complaint and regardless of the substance

of the section 89 complaint. This is the first time that the Board's practice in this regard has been challenged. As noted, the applicant relies on the Board's decision in *Domtar, supra* in making its challenge. The *Domtar* decision post dates the development of the Board's practice with respect to the order of proceeding in a section 8 complaint.

6. In the *Domtar* decision, *supra*, a case which deals with allegations involving the reverse onus and allegations which do not trigger the reverse onus under section 89(5), the Board took the position that it has a discretion as to who should proceed first and that it should exercise its discretion on the basis of its assessment as to what constitutes the essence of the section 89 complaint. In that case the Board determined that the complaint centred on alleged misconduct which triggered the reverse onus provisions of section 89(5) of the Act and, as is the Board's practice in complaints where the reverse onus applies, ordered the employer to proceed. The Board did so notwithstanding the fact that it had almost invariably ordered the union to proceed first in this type of case up to that time.

7. Just as the Board has a discretion with respect to who proceeds first in a mixed onus unfair labour practice complaint so also the Board has a discretion to determine who proceeds first in a consolidation of a section 89 complaint alleging discrimination with respect to employment, opportunity for employment or conditions of employment which triggers the reverse onus provisions of section 89(5), and an application for certification in which the Act is relied upon. In our view, there is no sound basis upon which to distinguish the *Domtar* decision, *supra* in its application to a section 8 complaint which has been consolidated with a section 89 complaint triggering the reverse onus provisions of section 89(5) of the Act. In these circumstances, the bulk of the evidence heard by the Board will be in respect of employer conduct which is alleged to be contrary to the Act as to the employment, opportunity for employment or conditions of employment of the employees affected. The employer bears the legal burden of establishing that he did not act contrary to the Act when this type of allegation is made. In addition the facts as to why the employer acted as he did lie peculiarly within the knowledge of the employer. It is to be observed as well that in a number of section 8 cases which have been consolidated with section 89 complaints triggering the reverse onus, where the union has proceeded first, the Board has found itself in the position of having to make some very difficult determinations as to the proper scope of reply evidence.

8. In this case the applicant union alleges that 11 employees of the respondent have been laid off because of their support for it. In addition, the applicant claims that a number of threats with respect to the continued employment of the trade union supporters have been made. Having regard to the nature of the section 89 complaint the employer bears the legal burden under section 89(5) of establishing that he did not act contrary to the Act. The bulk of the evidence in this case will be in respect of the section 89 allegations and these allegations are the central focus of this matter. In these circumstances, we have been convinced that we should direct the employer to proceed first.

9. Having regard to the foregoing, we hereby direct the respondent employer to proceed first in this matter.



**DECISION OF BOARD MEMBER W. H. WIGHTMAN;**

1. While recognizing that the long-standing practice of requiring the applicant to proceed first can result in “difficult determinations (for the Board) as to the proper scope of evidence”, I believe this prospect was given full consideration when the practice was instituted and that the implications of certifying the union under conditions where it had not demonstrated majority support outweighed other considerations.
  2. The fact that the practice may result in difficult determinations for the Board should not be determinative in my view. The legislative decision to reverse the onus in section 89(5) cases, and in so doing to make an exception to the natural justice concept of requiring the party who alleges to prove his case, must have been taken with some trepidation and in the expectation that the administrative tribunal would be watchful to ensure that the original intent was not broadened.
  3. The avoidance of difficult determinations for the Board does not strike me as a worthy basis for broadening the reverse onus provision.
  4. This new departure from Board practice is a clear step towards making it tactically advantageous for the union to link all manner of filings with a section 89(5) complaint on the chance that an exploitable weakness, real or inadvertent, will be revealed by the employer in the course of attempting to prove the negative involved in the Section 89(5) complaint.
  5. Not only does this seem to me a denial of natural justice to the employer but, as well, it can become an invitation to fishing expeditions of a specious nature.
  6. I would have held to the existing practice and required the union to proceed.
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**1477-82-U** Kuljinder Singh Bhanga and Newman Nkrumah, Complainants, v. United Food & Commercial Workers Local #287 and Charles Bonello, Respondents, v. **Caravelle Foods**, Intervener

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Eight month delay not "extreme" to cause refusal to inquire - Distinction between extreme delay resulting in refusal to inquire and unreasonable delay affecting remedy - Lack of particulars not resulting in lack of prima facie case - Meaning of prima facie case "for relief requested"

**BEFORE:** Corinne F. Murray, Vice-Chairman.

**APPEARANCES:** *Michael F. Smith for the complainants; Harold F. Caley and Charles Bonello for the respondents; James T. Heather for the intervener.*

**DECISION OF THE BOARD;** June 8, 1983

1. This is a complaint filed pursuant to section 89 of the *Labour Relations Act* in which the complainants allege a violation of section 68 of the Act by the respondents. They claim by way of remedy that they be reinstated to their former jobs with full pay. Paragraph 4 of the complaint (Form 32) [now 58] states that:

On or about 12th of February, 1982 the grievors were dealt with by the United Food Commercial Workers International Union Local #287 Charles Bonello, Business Representative contrary to the provisions of Section 60 [sic] of the Labour Relations Act in that he did on his own behalf or on behalf of the respondent: act in a manner that was arbitrary, discriminatory or in bad faith in representing the complainants/employees in a bargaining unit, by not submitting the complainants' grievance over their alleged wrongful dismissals to arbitration.

Subsequent to this and in response to a demand for particulars made by the respondent, the complainant's counsel supplied the following:

1. The particulars of the alleged violation of section 60 (now 68) as follows:
  - (a) Upon receiving from the complainants the report of their dismissal by the employer, on or about February 15, 1982, Mr. Bonello failed to consider all of the circumstances that were relevant to the termination and relevant to a determination of whether the termination would be upheld upon an Arbitration.
  - (b) Mr. Bonello treated the complainants in an arbitrary and discriminatory manner and in bad faith by refusing to submit the matter of their termination to Arbitration pursuant to the Collective Agreement.
  - (c) Mr. Bonello treated the complainants in an arbitrary and discriminatory manner and in bad faith in advising the

complainants that their grievance against the termination could not succeed at Arbitration and did so in a reckless, careless disregard of the complainants' rights under the Collective Agreement and as Union Members.

- (d) Mr. Bonello did not treat the grievance in the manner required by the Collective Agreement and did so in reckless and careless disregard of the complainant's [sic] rights.
- (e) Officials of the Respondent Local 287, United Food and Commercial Workers, treated the complainants in an arbitrary and discriminatory manner and in bad faith in not ensuring that their grievance was received and processed pursuant to the Collective Agreement, in referring the complainants to the Respondent, Charles Bonello, in delegating their responsibilities with respect to the grievance of the complainants to Mr. Bonello, in not ensuring that the grievance was treated in a fair and proper manner by Mr. Bonello and in adopting the conduct of Mr. Bonello with respect to the grievance.
- (f) The Complainants allege that the conduct of the Respondents, as well as its motivated intention, in violation of the *Act* is within the knowledge of the Respondents.

2. Both the respondents made three preliminary motions on the first day of hearing, February 7, 1983, that the Board ought to refuse to entertain the complaint because:

- (1) of the complainants' delay;
- (2) the complaint does not disclose a *prima facie* case; and
- (3) of insufficiency of particulars given by the complainants.

After hearing argument on all these points I reserved on the latter two motions and received evidence and additional argument as to the reasons for the eight-month delay between March of 1982 (the time by which the actions complained of had occurred) and November 2, 1982 (the date this complaint was filed). Since the evidence as to delay could not be completed on February 7th, a second day (April 11, 1983) was scheduled. This complaint had been originally scheduled for hearing for December 6, 1982, was adjourned on consent to January 17, 1983, and adjourned again to February 7, 1983.

3. The evidence in connection with the issue of delay is that the complainants were discharged February 16, 1982 arising out of an incident of alleged fighting which occurred on February 12, 1982. A steward (Shasha Prudham) and a business agent (Charles Bonello) of the respondent became involved on February 16, 1982 in trying to reverse the intervener's decision. About two weeks later a meeting was held between the respondent and the intervener regarding the complainants' termination. The complainants attended. Mr. Bonello was unsuccessful in getting the intervener to retract the discharges. On or about March 12, 1982, Mr. Bonello met with the complainants and told them the respondent union's lawyer said that their grievance seeking reinstatement would have no



chance of succeeding in arbitration. Mr. Bonello advised them that the respondent therefore would not pay for arbitration but if they wished to hire their own lawyer, they could. He attempted to solicit from the complainants what their decision was. The complainants did not make any decision at this time. Instead, Mr. Nkrumah testified that he called Mr. Bonello three days later to get the name and number of an official of the parent union at its "head office" and a telephone number for Local 287's President. Except for this call neither Mr. Nkrumah nor Mr. Bhanga spoke with or tried to speak with Mr. Bonello after March 12th.

4. It is clear that the meeting between Mr. Bonello and the complainants on March 12, 1982, ended amicably with all three shaking hands. The outstanding issue was whether the complainants were going to hire their own lawyer to go to arbitration.

5. The complainants gave different evidence as to what delayed their complaint to the Board arising out of these events. While Mr. Nkrumah did not summarize his reasons for delay in this way, his evidence indicates that between March and June he was trying "to find a lawyer to help him or to do it on his own". During this period he saw two different lawyers, made applications for legal aid and was refused. He claimed there was delay entailed in waiting for his and Mr. Bhanga's application for legal aid. Time was also consumed with making calls to the respondent's "head office". He also claimed to be suffering "financial difficulties" throughout this period. Mr. Bhanga said the delay was caused by lack of money, largely on Mr. Nkrumah's part, to pay for a lawyer to lodge a complaint to this Board.

6. It is not particularly useful to set out in great detail all of the complainants' evidence on these points. Suffice it to say that the complainants did not present a clear or cogent picture of why their complaint was delayed. After a considerable period of testimony, it ultimately became clear that the complainants either would not or could not pay for the arbitration of their dismissals. Shortly after March 12th, Mr. Nkrumah contacted a lawyer (a Mr. Jonas) whose advice was that he call the "headquarters of the union". The complainants later sought legal advice from another lawyer and, as a result, applied for legal aid. They were subsequently refused. The complainants said that their applications for legal aid were in May. Counsel for the respondent produced evidence, objected to by the complainants' counsel, which indicates that the applications and refusals for both Messrs. Nkrumah and Bhanga occurred between April 5th and May 6th. The evidence relied on by the respondent was a copy of Notices of Refusal Certificates (Form 3 under the *Legal Aid Act*, R.S.O. 1980, c. 234) originally issued by the Area Director of York. The complainants argued that these certificates were privileged because under section 25 of the *Legal Aid Act*, all "communication" between the Area Director and the applicants for legal aid are privileged. I do not find any merit in these submissions by the complainants and agree with the respondent's arguments that the meaning of "communications" in section 25 of the *Legal Aid Act*, would not catch the dates of applications and refusals. In any event, the complainants rested their explanation of delay, in part, on the waiting necessary for Legal Aid's processes. Once having taken this ground, the complainants cannot block the respondent's efforts to show that this ground is erroneous or incredible. If the dates on the Notices themselves are privileged, which I have found they are not, then the complainants have waived their privilege because no objection was made to the revelation of the dates of the complainants' applications and refusals in the original questions put to either complainant. Therefore I find that on the basis of the evidence produced by the respondent, application for legal

aid was made early in April and Mr. Nkrumah's was refused April 6th while Mr. Bhanga's was refused on May 6th.

7. It is clear from the evidence that neither complainant tried to complain to this Board, which does not require a lawyer, between May 1982 and August 1982. In August 1982 they apparently decided that they would pay the second lawyer they had contacted (the current counsel) to draw up the complaint. Mr. Nkrumah claimed he phoned the regional office of the union and spoke with a Mr. Park on no less than 8 occasions between March 19, 1982 and June 30, 1982. The respondent union called as its witness on this point Kevin Park, Research & Education Staff Officer for Region 18 of the United Food & Commercial Workers Union. He testified that he only received one call from Mr. Nkrumah and he placed the time of the call in August of 1982. As a result of this call, Mr. Park called Mr. Bonello to advise him that Mr. Nkrumah was concerned about his grievance not being referred to arbitration. This was Mr. Park's sole involvement. Mr. Park's evidence was highly credible, whereas Mr. Nkrumah's, on this and other aspects, was not. Therefore, I accept that it was not until August that Mr. Nkrumah made contact with the respondent's "head office" (in fact the regional office) and spoke on one occasion to Kevin Park. No mention was made in that call about suing the union. Mr. Nkrumah also testified that he phoned the President of the Local (employed by a different company) sometime in March after his last meeting with Mr. Bonello. The testimony of the President, which was highly credible, was that he received only one call in February and he directed Mr. Nkrumah to deal with Mr. Bonello. I find that the complaint was signed some months prior to its being filed. Mr. Bhanga apparently left all of the contacting of lawyers and calls to the union in Mr. Nkrumah's hands. Mr. Bhanga explained his delay as being attributable generally to a lack of payment of funds and particularly the full \$750.00 fee required by the lawyers. The latter did not stand up under cross-examination because Mr. Bhanga admitted that \$300.00 had been paid as of the date the complaint was signed and the balance was not paid until one week prior to the original day's hearing (February 7, 1983). Therefore, I have received no explanation for the delay between September 20, 1982 and November 4, 1982.

8. The result of this evidence is that so far as the respondent and its officers are concerned they had no knowledge that the complainants were intending to bring action against the respondent for its treatment of them until the instant complaint was lodged.

9. The Board has in previous cases described delay as being either "extreme" or "unreasonable". Extreme delay warrants a dismissal on preliminary motion. However, unreasonable delay impacts on the remedy but does not deny the complainants the opportunity to prove the violation of the Act. (See *CCH Canadian Limited* [1977] OLRB Rep. June 351.) Section 89(4) of the Act gives the Board discretion to decide whether it will inquire into an unresolved complaint. Section 72 of the Board's Rules of Procedure (fully set out below) requires that a complainant file allegations of wrongdoing "promptly" upon discovery of the wrongdoing. If, in the opinion of the Board, the allegations and particulars thereof have not been filed promptly, the Board may refuse to allow the evidence to be adduced or, alternatively, may only permit the evidence to be adduced upon specified terms or conditions. The Board has been, by and large, more willing to hear complaints than to refuse, using its remedial powers, to reduce the prejudicial effect of the complainants' delay on the respondent. The nature of delay is assessed not only on the basis of time elapsed but the effect on labour relations or a

collective-bargaining relationship if the complaint is entertained when there is no remedy to be given or the remedy would be deleterious to the relationship. In *Sheller-Globe*, [1982] OLRB Rep. Jan. 113, the Board summarized the test in a section 68 complaint as follows, at paragraph 13:

... The Board has always been conscious of the need for expedition in its practices and procedures. The delay in the present case raises concerns over an appropriate remedy, if the Board *were* to permit this complaint to now proceed, which are not fully answered by the complainant's concession as to damages. In circumstances such as the present, the onus shifts to a complainant to satisfy the Board that there are compelling labour relations reasons to cause the Board to exercise its discretion and entertain the complaint under section 89.

The thread running through all the section 68 cases dealing with delay is a concern as to the effect of the process and/or the remedy on the collective-bargaining relationship. This is because the remedy sought has usually been a demand for arbitration or restoration of lost rights, not only for monetary compensation. These remedies require the parties to the collective-bargaining agreement to do battle over an individual's rights which they have both considered no longer an issue in their relationship because of an elapse of time. The Board's general approach is summarized in *The Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, (also a section 68 complaint) at paragraphs 21 and 22 as follows:

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay – holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship – quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a machanical [sic] response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability [sic] or could impact upon the pattern of relationships which has developed



since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

10. On the facts before the Board in this case the delay has not been “extreme” (i.e., warranting an outright dismissal). While the complainants did not impress me with their candour, this is not a ground upon which a complaint ought to be dismissed without hearing the merits. Their conduct in pursuing this matter may have been less than aggressive but I am unable to conclude that this was sufficient to refuse to hear their complaint. Although not made clear, the complainants’ evidence reveals they both thought that retaining counsel to prepare their complaint was necessary and the cost of doing so was a significant hurdle that they had to cross. It appears that a large amount of time was allowed to pass while the complainants decided how and whether they would pay the necessary price. The respondent and the intervener did not present evidence of prejudice which has been caused by the delay of 8 months and the extent of delay has not been so lengthy as to cause me to conclude without such evidence that there was or is severe prejudice to their labour relations should the remedy requested (reinstatement with back pay) be granted which could not be adjusted in the remedy itself. The assessment of the conduct in bringing a complaint forward must necessarily take into consideration the nature of the complaint. On this basis, the case before me is distinguishable from the facts before the Board in *CCH Canadian Limited*, supra, which was a complaint by a union, on behalf of a grievor, against an employer which was not brought for approximately a year. In that case the Board could find no explanation for the delay on the union’s part where it had knowledge of other employees being hired after the discharge. A union, wise to the remedies of this Board, should have acted sooner. Messrs. Nkrumah and Bhanga should not be expected to act with the same alacrity as a union whose day-to-day business is dealing with individual employee’s rights. The facts are also materially different from those in the *Shell-Globe* (supra) and *City of Mississauga* (supra) decisions both of which entailed lengthier delays. Therefore, the respondent has failed to show there was “extreme” delay in bringing this complaint. The question of unreasonable delay remains open to argument.

11. I will now deal with the remaining preliminary points regarding the form of the complaint and the insufficiency of particulars. The respondent argues that the complaint does not disclose a *prima facie* case and that I should dismiss the complaint without hearing, pursuant to Regulation 546/80, s.71. The respondent cited three decisions in support of its position: *Local 1285 U.A.W.*, [1975] OLRB Rep. Apr. 387; *Thomas Products Co. Ltd.*, [1980] OLRB Rep. July 1095 and *Corporation of the City of Toronto*, [1980] OLRB Rep. Sept. 1288. Alternatively, the respondent argues that the complaint fails to disclose particulars and should be dismissed pursuant to section 72 of Regulation 546. The respondent argues that the response to its demand for particulars ought not to be considered in determining whether the complainants have made out a *prima facie* case

because the respondent ought not, by making such demand, to facilitate the creation of “an opportunity for the complainants to buttress their case”.

12. [Sections 71 and 72 of the Board's Rules of Procedure omitted]

13. Section 89 of the Act only permits the Board to remedy breaches of the Act. Section 71 of the Board's Rules of Procedure is a means by which the Board can avoid unnecessary expense and time involved in hearing a complaint which is without substance in the sense that no breach of the Act is alleged. In times past a “screening” panel of the Board determined whether a complaint disclosed a *prima facie* case and should be listed for hearing (see *Ford Motor Co.*, [1972] OLRB Rep. Sept. 828). The screening panel was distinct from the inquiry panel, and could rely on not only the complaint itself but the contents of a Labour Relations Officer's report (see *Thomas Products Co. Ltd.*, supra). The inquiry panel could not do so because the contents of such a report could deny a party fair hearing before the inquiry panel. Section 71 is not a means by which a party who has submitted a poorly-drafted or inarticulate complaint but who may have a proveable case against a union or an employer can be denied a hearing. The words “*prima facie* case” in section 71 are meant to allow the dismissal of a case without a hearing where the allegations are insufficient to render reasonable or arguable a conclusion that the Act has been breached. Section 72 is directed toward a different goal. It allows the Board to refuse to hear evidence of facts not alleged promptly in support of a complaint or to regulate when, how and under what conditions they may be adduced. Section 72, in contrast with section 71, does not state that the Board may dismiss the *total* case because it is insufficiently particularized. While it may be that a case deficient in particulars will also not make out a *prima facie* case (see *Corporation of City of Toronto*, supra), this is not always the case. It is also possible that a fully particularized complaint will not make out a *prima facie* case. (For example, see *Local 1285 U.A.W.*, supra.) Therefore, while the completeness of particularization could have an effect on the decision of whether there is a *prima facie* case made out, it is not of itself determinative.

14. The respondent argued that the Board has established in *Thomas Products*, supra, that the mere assertion that the union has not referred a grievance to arbitration does not constitute a *prima facie* case and asks the Board to dismiss the complaint on that basis. A close perusal of that decision reveals this is not the effect of that decision. What the screening panel of the Board found was, having regard to the material in the Labour Relations Officer's report, a case establishing that there was anything arbitrary, discriminatory or done in bad faith in connection with the non-referral had not and could not have been made out. While the instant complaint (Form 58) contains little particularization of why the complainants feel the non-referral of their grievance was arbitrary, discriminatory, and in bad faith, they nevertheless assert that it was done in this fashion. This makes the *Thomas Products* case distinguishable.

15. While it may be necessary in another case to consider subsequent particularization, in this instance I have determined that it is not necessary to consider the particulars the complainants supplied on February 4, 1983. On the face of the complaint, the remedy requested is reinstatement with pay. While it is possible to construe the words “remedy requested” in section 71 so narrowly as to allow only a literal reading of the complaint itself and thus ignore the general remedial power of the Board, a more expansive

interpretation should be taken so that at least the remedy of a declaration can be considered in weighing whether there is a *prima facie* case made out. I have concluded that if the complainants can prove that Mr. Bnello's non-referral was arbitrary, discriminatory or motivated by bad faith, a violation of section 68 could be made out. The Board has in the past found no *prima facie* case to exist where no violation of the Act is provable (see *Thomas Products*, supra; *Corporation of City of Toronto*, supra; *Ford Motor Co.*, supra) [1972] OLRB Rep. Sept. 828) or where the matters raised are *res judicata* (*Concrete Construction Supplies*, [1979] OLRB Rep. Dec. 1152) or where the facts alleged could not support an argument that a violation of the Act had occurred (see cases cited in *International Association of Bridge, Structural and Ornamental Ironworkers*, [1982] OLRB Rep. Feb. 233). None of those situations exist on the facts before me. While the respondent may have wanted the complainants to be more explicit in explaining why they thought Mr. Bonello was acting in an arbitrary and discriminatory fashion in dealing with their grievances, this is a different matter from not making out a *prima facie* case under section 71 of the Rules of Procedure.

16. The respondent argued that the original complaint was insufficient in particularity and the particulars supplied do not correct this deficiency. I agree that the complainants' original complaint does not fulfill the requirements of section 72 and the subsequent particularization does not materially change this situation. Therefore, the Board directs that further and additional particulars be given to the respondent to allow it to prepare its defense.

17. Therefore, for all these reasons this matter is directed to the Registrar for listing for hearing before me.

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**0277-83-U** Erich Pest, Complainant, v. Ontario Public Service Employees Union, Respondent, v. **Conestoga College of Applied Arts & Technology**, Intervener

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Union unsuccessfully taking discharge grievance to arbitration and judicial review - Complaint alleging failure to retain legal counsel at arbitration and unsatisfactory presentation of case by union representative - Events having occurred three years prior to date of complaint - Board finding substantial undue delay - Union not required to retain lawyer where practice to use union representative - No *prima facie* case - Complaint dismissed without inquiry

**BEFORE:** R. D. Howe, Vice-Chairman.

*APPEARANCES:* Leroy A. Crosse, Erich Pest and Earl Brewster for the complainant; Israel Freedman for the respondent; Michael Hines and John Podmore for the intervener.

**DECISION OF THE BOARD;** June 10, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that he has been dealt with by the respondent contrary to section 68 of the Act.



2. At the hearing of this matter on June 7, 1983, the Board gave the following oral decision, which is hereby confirmed: -

"Having carefully considered the submissions of the parties, I am of the view that this is an appropriate case for the Board to exercise its discretion under section 89 of the *Labour Relations Act* to decline to inquire into the complaint. The events which gave rise to the complaint occurred in 1980. Following the complainant's discharge by the intervener in April of 1979, the respondent filed a grievance which was processed to arbitration in accordance with the collective agreement. The arbitration came on before a board of arbitration chaired by Howard D. Brown on January 23, 1980 with continuations of hearing on May 7, September 3 and September 10, 1980. The respondent and the complainant were represented before the arbitration board by Michael Pratt, an experienced full-time grievance officer in the employ of the respondent. In a detailed award dated February 26, 1981, from which the union nominee dissented, a majority of the arbitration board dismissed the grievance. Thereafter, the respondent sought legal advice from a law firm experienced in labour relations, and instructed that firm to seek judicial review of the arbitration award. The application for judicial review came before the Divisional Court on February 9, 1982, at which time the Court, in an oral judgement, dismissed the application. Mr. Pratt formally advised the complainant of the Court's disposition of the matter by letter dated March 29, 1982. Thereafter, the complainant met with Mr. Sean O'Flynn, the President of the respondent, in an unsuccessful attempt to obtain a resolution of his continuing dissatisfaction with his discharge. In the fall of 1982 the complainant contacted a lawyer (other than his present counsel) but no complaint was filed with the Board until May 5, 1983, when the complainant, without legal assistance, filed the present unparticularized complaint.

In his oral submissions, counsel for the complainant advised the Board and the other parties that his client alleges that the respondent breached section 68 of the Act by acting in a manner that was 'arbitrary' in the representation of the complainant at the aforementioned arbitration hearing. The 'arbitrariness' allegedly consists of the respondent's failure to retain counsel to present the complainant's case before the arbitration board, Mr. Pratt's failure to adduce at that hearing certain evidence which the complainant considered to be relevant (including a petition in support of the complainant), and Mr. Pratt's alleged failure to object to the introduction of certain evidence.

In the *Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, the Board described its approach to delay in cases of this type as follows:

'20. It is by now almost a truism that time is of the essence in labour relations matters. It is universally recognized that the

speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it—including the employees—are entitled to expect that claims which are not asserted with a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E.* 3 L.A.C. 980 (Laskin); and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay—holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship—quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of

records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.'

(See also *Chrysler Canada Limited (Re Kazimir Cigan)*, Board File No. 1530-82-U, decision dated April 18, 1983, to be reported in [1983] OLRB Rep. April; *Chrysler Canada Limited*, [1982] OLRB Rep. Oct. 1417; *Concrete Construction Supplies*, [1982] OLRB Rep. Oct. 1446; and *Sheller-Globe of Canada Ltd.*, [1982] OLRB Rep. Jan. 113.

Having regard to those principles, the Board finds that this is an appropriate case in which to exercise its discretion under section 89 of the *Labour Relations Act* to decline to inquire into the complaint. The events upon which the complainant relies occurred approximately three years ago. While it may have been reasonable for the complainant to await the issuance of the arbitration award, and perhaps even the Divisonal Court decision, before raising a complaint about the manner in which he was represented by Mr. Pratt in January of 1980 (and thereafter), there is a substantial period for which the complainant has failed to provide an adequate explanation for his failure to file a complaint about the matters which he now seeks to raise before the Board. The remedy which the complainant seeks is payment by the respondent of the pension contributions which would have been made to the intervener's pension plan had the complainant not been discharged. He also seeks to have the respondent attempt to persuade the intervener to revoke his discharge and permit him to resign from the employment of the intervener with vested pension rights.

Having regard to all the circumstances, I find that there has been substantial undue delay on the part of the complainant which, if this matter were permitted to proceed, would operate to the prejudice of the respondent in view of the nature of the claim asserted by the complainant, and the basis of that claim. Moreover, I am also of the view that this complaint should be dismissed without a hearing on the merits since the complaint, as orally particularized by counsel for the complainant, does not make out a *prima facie* case for any relief under the Act. It is clear from the undisputed facts stipulated before me that the complainant was represented by an experienced grievance officer at an arbitration hearing which continued for four days in respect of his discharge by the intervener. Thereafter, the respondent retained experienced counsel and sought to have the arbitration award quashed. The complainant does not allege that he was treated any differently than any other persons represented by the respondent, nor that Mr. Pratt dealt with him in bad faith. It is



apparent from the arbitration award (which was filed with the Board by the respondent on the consent of the parties) that evidence similar to that which the complainant alleges should have been introduced was in fact introduced but found not to be persuasive. It is also evident (from page 20 of the award) that the arbitration board took into account the fact that a petition in support of the complainant had been circulated and signed by certain faculty members. The award also indicates that Mr. Pratt did object to the introduction of the evidence which the complainant alleges should not have been permitted to be introduced, but that his objection was overruled by the majority of the arbitration board and, ultimately, by the Divisional Court. It is not the function of this Board in a section 89 complaint based upon section 68, to 'second guess' an experienced union official in the presentation of an arbitration case on behalf of a complainant, nor is it the Board's function to impose a duty upon a trade union to retain a lawyer to represent it before an arbitration board where, in accordance with its normal practice, it assigns the case to a member of its staff experienced in presenting such cases.

For the foregoing reasons, this complaint is hereby dismissed."

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**2406-82-U** Eric Dunkley, Complainant, v. Canadian Union of Operating Engineers, General Workers, Respondent, v. **Cryovac**, Division of W. R. Grace and Co. Ltd., Intervener

Duty of Fair Representation - Unfair Labour Practice - Whether quality of representation received at arbitration hearing amounting to unfair representation - Whether evidence necessary not presented - Failure to provide lawyer no breach - Complaint dismissed

**BEFORE:** Corinne F. Murray, Vice-Chairman.

*APPEARANCES:* Eric Dunkley on his own behalf; Robert Sleva, Claude Duchesneau and Lusha Larney for the respondent; Martin Addario and W. A. Moir for the intervener.

**DECISION OF THE BOARD;** June 17, 1983

1. This is a complaint pursuant to section 89 of the *Labour Relations Act*, alleging that the respondent has breached section 68 of the Act. This complaint was considered in a preliminary way in the Board's decision dated April 13, 1983. By that decision the Board rejected the respondent's argument that the complainant did not raise a *prima facie* case and therefore should not be heard. As a result, the complaint was re-listed for hearing. This decision is the result of that hearing.

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[Review of evidence omitted]

7. The gist of Mr. Dunkley's complaint is that he was unrepresented by a lawyer. To quote Mr. Dunkley himself, it is his opinion that:

“When one person goes to court with a lawyer and another does not, the former will win.”

It has been stated on numerous occasions that a union official representing the grievor's interest need not be a lawyer. (See, for example, *Rutherford's Dairy Limited*, [1972] OLRB Rep. March 240.) This is so, not only for the processing of a grievance through the grievance procedure, but also representation at arbitration. (See, for example, *General Motors*, [1982] OLRB Rep. Feb. 181.) The reason why the Board has interpreted section 68 in this fashion is in recognition of the fact that most functions of representation within unions are carried out by persons who are not legally trained. (See *Douglas Aircraft*, [1979] OLRB Rep. Aug. 745.) Therefore, in order for the complainant to succeed in establishing a breach of section 68, he must show more than the failure to appoint a lawyer to take his case. He must show that not only was a mistake made, but also that the mistake was so flagrant, reckless or capricious, that the Board is led to the conclusion that the union has been arbitrary. (See *ITE Industries Limited*, [1980] OLRB Rep. July 1001, at paragraph 19.) In assessing the conduct of a union official in arbitration proceedings (including preparation therefor), the Board ought not to be second-guessing the judgement of that official. The question is whether the official has breached the duty established under section 68. In my opinion Mr. Dunkley has failed to establish that Mr. McManus did not give proper attention to his case or that any reckless, flagrant or capricious mistake was made.

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**1920-82-R** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. 268121 Ontario Limited and **Hamilton Cargo Transit Limited**, and Peat Marwick Limited, Respondents, v. Labourers' International Union of North America, Local 1267, Intervener, v. A Group of Employees, Interveners.

Sale of a Business – Receiver and manager appointed for insolvent business – Whether sale of business occurring at receiver stage – Whether application premature – Board finding “limited – term” transaction resembling lease to be sale – Distinguishing *Price Waterhouse* case – Purchaser's employees organized by Labourers' union – Board considering intermingling – Amending Labourers' unit to exclude employees of acquired represented by Teamsters

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

**APPEARANCES:** *Ken Petryshen, Joe Contardi and Dan McIlravey for the applicant; Clifford Neal for 268121 Ontario Limited, Paul G. Fisher for Peat Marwick Limited; John R. McPherson, and Joseph MacDonald for the intervener union; Charles Corrigan for the employee interveners.*

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD; June 9, 1983**

1. This is an application under section 63 of the *Labour Relations Act*. The matter was before the Board on an earlier occasion, but the Board, by decision dated February 15, 1983, adjourned the application pending completion of a Proposal to be made to the creditors of Hamilton Cargo Transit Limited. That Proposal was accepted by the creditors, and the application has now been heard by the Board.

2. Hamilton Cargo Transit Limited has been in the business of providing local cartage service in the Hamilton area, principally the haulage of steel. The company operated under a number of licences granted by the Ontario Highway Transport Board, with its terminal most recently located on Woodward Avenue in Hamilton. As a result of growing financial difficulties, the company was placed in receivership on October 29, 1982, by its chief secured creditor, the Canadian Imperial Bank of Commerce. Peat Marwick Limited was named as Receiver and Manager. The applicant Teamsters Local has had a lengthy collective-bargaining relationship with Hamilton Cargo, the most recent collective agreement between the two expiring October 30, 1982.

3. By agreement dated November 15, 1982, the Bank covenanted to sell to a third party, Cole Equipment Rental Company Limited, all of the Bank's security interest in what essentially were all of the Hamilton assets of Hamilton Cargo Transit Limited, for the price of \$350,000. The transaction was contingent upon a number of matters, including the approval of the Ontario Highway Transport Board of the transfer of the licences, and satisfactory financing arrangements. The agreement contemplated that the Bank would ultimately finance the purchase of the business by Cole Equipment, and if the Bank decided against doing so, Cole Equipment had the option of terminating the agreement. On the same date, the Receiver and the Bank entered into a further agreement with a second company, 268121 Ontario Limited, for that company to operate and manage the business of Hamilton Cargo until completion of the sale transaction contemplated by the first agreement. The purpose of this second agreement was, as the Receiver put it, "to preserve the licences and business of Hamilton Cargo, so that there would be something left to sell at the end". Mr. Clifford Neal, the principal behind 268121 Ontario Limited, confirms that this was the understanding and intent of his involvement. Mr. Neal is not an owner in Cole Equipment Rental Company Limited; that is a company owned principally by Mr. Hugh Cole, together with two other minor shareholders not related to Mr. Neal. Mr. Neal, however, appears to have negotiated the sale of the business on behalf of Cole Equipment Rental Company Limited, and the Bank's decision whether to lend the funds for the purchase price to Cole Equipment Rental was to be based on the credit-worthiness of both Mr. Cole and Mr. Neal. It would appear, therefore, that the full participation of Mr. Neal in the final transaction has yet to be explored. Mr. Neal did acknowledge that he and the numbered company have a close working relationship with the Cole group of companies (principally with Mr. Cole's operating company, Cole Construction Limited) and that he expected to reap a benefit from the ultimate sale of this business to Cole Equipment Rental (a holding company) by being permitted to continue to carry on the business as manager for that company. In keeping the entire transaction in perspective it might also be noted that if the agreement of purchase and sale to Cole Equipment Rental is terminated for any reason, the interim management agreement with 268121 Ontario Limited immediately terminates as well.



4. 268121 Ontario Limited has in fact been carrying on the business since November of 1982, primarily through the use of the existing employees and broker-drivers of Hamilton Cargo. Mr. Ron Foxcroft, one of the two former shareholders and managers of Hamilton Cargo, also continued to be employed in a managerial capacity for a period of time by the numbered company. The numbered company has road-hauling operations of its own centered in St. Catharines, and three or four drivers with their rigs are, from time to time, asked to report for duty at the Hamilton Cargo terminal on Woodward Avenue. This, Mr. Neal explained, is only on an "as needed" basis, and in fact occurs, according to Mr. Neal, only "occasionally". 268121 Ontario Limited does, however, have a collective agreement with the Labourers' International Union of North America, Local 1267, covering its operations in various municipalities across the province, including Hamilton, and Mr. Neal has, since the assumption of the operation began, applied that collective agreement to *all* employees engaged in the operation of the Hamilton Cargo business. This includes the required remission of union dues by the company to Local 1267, and the payment of all drivers at the rate specified in that collective agreement (being 50¢ an hour less than what the Hamilton Cargo drivers had been receiving under their Teamster agreement).

5. Two of the former Hamilton Cargo drivers, John Middleton and Charles Corrigan, appeared at the initial hearing of the Board in February, and Mr. Middleton filed a document signed by a number of individuals indicating that they "no longer wish to be represented by the International Brotherhood of Teamsters, Local 879". That panel of the Board noted that the document had not been filed in the manner set out in the Notice to Employees of the application, but went on to indicate that the weight, if any, to be accorded the document as well as the role of Mr. Corrigan and Mr. Middleton in the proceedings were matters best left to the panel of the Board which would deal with the application on its merits. The Registrar was accordingly directed to give both Mr. Corrigan and Mr. Middleton notice of the new hearing date in this matter. The Registrar has done that, but only Mr. Corrigan appeared at the subsequent hearing. Mr. Corrigan did not sign the document previously filed with the Board, nor does he support it. The Board accordingly has no *viva voce* evidence whatsoever before it to identify the individuals named on the document, nor to satisfy the Board in some measure that it represents the actual wishes of the persons who signed. On that basis alone, therefore, the Board indicated at the hearing that it would give the document no weight, without deciding what effect, if any, the document might otherwise have had. At the second hearing a fresh document was filed, however, by Mr. Corrigan, signed by a number of individuals affirming their support for Local 879 of the Teamsters. The Board indicated that in the context of these proceedings the greatest effect that the document might have would be to cause the Board to direct the taking of a representation vote between the two competing unions, but that as it was only the Labourers' Union which felt that such a vote was necessary, a further inquiry into the circumstances surrounding the document was unnecessary. The Teamsters made it clear that they were not relying upon the document in support of their submission that the Board ought simply to declare that the Teamsters agreement continues to apply, without the necessity of conducting a representation vote.

6. The applicant at the previous hearing had also requested the Board to add Cole Equipment Rental Company Limited as a respondent, since that company had apparently purchased all of the shares of Hamilton Cargo Transit Limited. The applicant also filed a letter requesting the Board to consider the application of section 1(4) in this matter. The

Board did cause notice of the proceedings to be sent to Cole Equipment Rental Company Limited, as requested, but, based on the misinformation of the applicant and the Receiver, apparently to the wrong address. At the hearing the section 1(4) allegation was not proceeded with, and in light of the Board's disposition of this matter, the possible lack of notice to Cole Equipment Rental Company Limited will not be material.

7. The applicant acknowledges that an application for a "sale of a business" declaration may at this point be premature with respect to the pending sale to Cole Equipment Rental Company Limited, but urges the Board to find that an interim disposition has taken place to 268121 Ontario Limited, through the Receiver. The applicant acknowledges the findings of the Board in various cases, for example, *Price-Waterhouse Limited*, [1979] OLRB Rep. Jan. 50, that at the Receiver stage, no "sale" can be said to have taken place, but argues that the present case is distinguishable.

8. In the *Price Waterhouse* case, the Receiver was itself carrying on the business for the insolvent company to protect the Bank's interest while a suitable purchaser was being sought. The Board commented as follows:

7. The Board considers that this application has been prematurely brought. In order for a sale of a business within the meaning of Section [63] to occur, it is necessary that there be a disposition from, in this case, the employer that is party to the collective agreement to another person. An examination of the relationship existing between the company and the respondents reveals that this has not yet occurred. What has happened is that a receiver has been appointed to manage the business - so that the Bank which holds a first charge on the assets and undertaking may enforce its security. Although the receiver is carrying on the business for the benefit of the Bank to which it owes a fiduciary duty, its actions are those of the company which retains the legal and equitable ownership of the assets. Under the terms of the debenture constituting the receiver as the agent of the company, the company is "solely responsible for the receiver's acts or defaults and for its remuneration and expenses". In these circumstances, it cannot be said that a disposition within the meaning of Section [63] has occurred.

In the present case, the agreement between the Receiver, the Bank and 268121 Ontario Limited provides in paragraph 1:

... the day-to-day operations of the Company shall be managed by the Manager under the supervision and control of the Receiver.

Beyond that, there are considerable differences, however, between this case and the *Price-Waterhouse* case. In this case the revenues generated from the operation of the business do *not* enure to the benefit of either the Bank or the debtor company. Rather, the agreement provides in paragraph 8:

All revenues earned for trucking under the Management Agreement will belong solely to the Manager, subject to all expenses specifically

incurred in those operations under the Management Agreement and will not form part of the monies available to any creditors of the Company.

And in conjunction with this, at paragraph 7:

The Manager shall be entitled to use the Company's equipment and inventory during the term of the Management Period. ...

In consideration of this, the Manager agrees to pay to the bank as part of the Manager's "expenses" a monthly fixed sum in the amount of \$500.00, "such payments being intended to partially compensate the Bank for the use of the company's assets secured in favour of the Bank".

9. Again, unlike the *Price-Waterhouse* case where the Receiver at all times was acting solely as the agent of the defaulting company in the continued operation of the company's business, so that the defaulting company at all times remained responsible, the present agreement provides in paragraph 3:

The Manager shall indemnify the Receiver and the Bank and hold the Receiver and the Bank harmless from and against any operating losses, damages, actions, claims, costs and expenses that are incurred during the Management Period.

The Manager also has the authority and the responsibility for the normal billing and collection of accounts, and, again, does so solely for its own benefit, with the exception of the accounts that were outstanding as of the date that the Manager took over. Specifically, its responsibilities are described in paragraph 5 as follows:

During the Management Period, the Manager shall:

- (a) Only operate in accordance with the normal course of the Business and only in accordance with such rates as are filed by the Company with the regulatory bodies;
- (b) Prepare and file all reports as required by various government authorities;
- (c) Manage the Business of the Company in accordance with the Company's Operating Authorities and all applicable laws, regulations and by-laws;
- (d) Use its best efforts to promote the interests of the Business of the Company and to protect the rights and interests of the Company in the Business;
- (e) Use its best efforts to provide a first class service to the shipping public;



- (f) Maintain the Company's accounts, books and records and prepare on behalf of and submit to the Bank and the Receiver monthly cash flow statements and provide the Bank and the Receiver with full and unobstructed access to the said accounts, books and records;
- (g) Cause the Company's employees, at the Manager's expense, to take all appropriate steps to collect any and all accounts receivable which are or may be owing to the Company prior to the commencement of the Management Period, the Manager hereby covenanting with the Bank and the Receiver that such funds so received will be deposited in the Bank's Trust as provided in paragraph 10 hereof; provided that "appropriate steps" shall not include the institution of any legal proceedings except upon the Receiver giving instructions to that effect and then at the cost and expense of the Receiver;
- (h) Cause the Company's employees, at the Manager's expense, to carry out normal accounting and associated functions such as preparation and delivery of income tax statements as to source deductions for employees, severance notices, etc. for the period ending on the commencement of the Management Period; and
- (i) Provide such coverage of insurance for the operation of the company, during the Management Period, and for such amounts as the Bank and the Receiver require, and provide the Bank and the Receiver with proof thereof.

10. From all of the above, it can be seen that, contrary to the situation existing in, for example, the *Price-Waterhouse* case, any profit from the current operation of the business enures to the benefit of the "Manager". The Bank's sole interest is to have the business preserved in its present form for ultimate sale as a "going concern". Consistent with that, there are certain other limitations on the authority of the Manager. These are set out in paragraph 6 as follows:

During the Management Period, the Manager shall not, without the prior written consent of the Bank and the Receiver:

- (a) Mortgage, charge, sell or otherwise dispose of any property of the Company;
- (b) Make any expenditures on behalf of the Company out of the ordinary course of business;
- (c) Incur any indebtedness on the part of the Company for borrowed money.

The whole arrangement, in fact, has far more of the attributes of a "lease", than it does of

a “sale” in the ordinary sense. But the definition of a “sale” under the Act is extremely broad, and in fact uses the term “lease” itself. Section 63(1)(b) provides:

“sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

And as the Board has said, for example, in *Thunder Bay Ambulance Service*, [1978] OLRB Rep. May 467, at paragraphs 11 and 12:

11. ... The word ‘sells’ as used in Section 55 [now 63] of the Act encompasses any transaction or series of transactions which results in the transfer of the predecessor’s ‘business’ or parts thereof.

12. The expansive meaning which attaches to the term ‘sells’ as used in Section 55 underscores the purpose of the section. The section is designed to preserve bargaining rights regardless of the legal form of the transaction, where there is a continuum of the business. The Board discussed the intent of the section in *Aircraft Metal Specialists Limited*, [1970] OLRB Rep. Sept. 702 in the following terms:

‘Once the union has been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and Section 47A (now Section 55) allows the union to pursue that bargaining right when all or part of the business is sold.’

Bargaining rights which are conferred by the Board or by voluntary recognition attach to a particular business and continue by operation of Section 55 so long as the business continues.

The very use of the word “lease” in the definition in the Act seems to leave no doubt that the transfer of assets contemplated by the section may be for a limited period only, and that title to the assets need not pass at all. The inquiry is by no means academic, since an arrangement like the present may continue for months or even years prior to the time that an ultimate sale of the business is completed.

11. The facts in this case leave no doubt that what we have at this point is the continued operation of the “business” of the insolvent. The only question is whether the Board will find a “sale” to have taken place. The applicant is likely correct when it submits that, even in the absence of an interim “sale”, no party would be in a position to continue to operate the “business” of the insolvent without regard to the collective-agreement obligations which the insolvent itself was subject to. As the Board noted, for example, in *Price-Waterhouse Limited*, *supra*:

8. It should be emphasized that the result of our decision is not that the bargaining rights of the applicant have been lost, which was the

result in all previous proceedings in which a Section [63] declaration was refused by the Board. As was recognized by counsel for the respondents, the company's obligations both under the Act and the collective agreement were not extinguished by the appointment of the receiver. So long as the business continues to function, those obligations persist. For that reason, the receiver has continued on behalf of the company to honour the collective agreement.

But as a matter of law, we find the present arrangement to fall within the definition of a "sale", as that term is used in the *Labour Relations Act*, and the applicant is entitled to the declaration that it seeks. We find that there has been a "sale" of the "business" of Hamilton Cargo to 268121 Ontario Limited, albeit on a limited-term basis, and with the restrictions necessary to preserve the business "as is". In this particular case the business of the predecessor is, subject to the fixed monthly "user" fee of \$500.00, being run solely for the profit of the "Manager". No third party is entitled to do that, under the provisions of section 63, without regard to the relationship existing between the predecessor employer and its Union. For the ability of a Receiver to effect a "sale" as agent for the predecessor employer see, e.g., *Big Bear Storage*, [1979] OLRB Rep. Mar. 164, and the cases cited therein.

12. The Board under section 63 of the Act issues a declaration of legal rights only, and does not, on its own, make any findings of past liability consequent upon that declaration. Where a collective agreement is in effect, subsection (2) of section 63 provides that:

... the person to whom the business has been sold is, *until the Board otherwise declares*, bound by the collective agreement as if he had been a party thereto ...

so that normally a retroactive finding of liability, enforceable through the grievance and arbitration procedures of the collective agreement, flows from a declaration of a "sale" by the Board. In the present case, however, the applicant acknowledges that the "sale" took place after the expiry of its collective agreement, and that it is section 63(3) which applies. That section provides:

Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.



The Board in *Oxford Manor Nursing Home*, [1980] OLRB Rep. Dec. 1786 made it clear that the “freeze” provisions of section 79 do not come into play until notice to bargain has been given to the successor. But in any event, the conflicting claim of Labourers’ International Union Local 1267 brings this matter squarely within the contemplation of section 63(4) of the Act.

13. Section 63(4) provides:

Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

- (a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or
- (b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represents the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

The scope clause of the Labourers’ collective agreement provides:

#### ARTICLE - RECOGNITION

1.01 The Company recognizes the Union as the sole collective bargaining agent of all employees of the Company employed at or working out of Mississauga, Brampton, Hamilton, St. Catharines, Niagara Region and Metropolitan Toronto, save and except foreman, persons above the rank of foreman, office staff and shop employees and persons regularly employed for not more than twenty-four (24) hours per week.

The claim of 268121 Ontario Limited that it had to apply the terms of the collective agreement of its existing bargaining agent to the employees of the new operation, or face a grievance under that collective agreement, appears well founded. The Board would be hard pressed to find that an employer faces liability under *both* collective agreements in a situation like the present until such time as the Board has made its disposition under subsection (4).

14. Subsection (6) of section 63 provides as well:

Notwithstanding subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

As can be seen, the Board is given under subsection (4) much of the same powers given under subsection (6) cited above. In addition, the Board is given general power under subsection (8) of section 63 as follows:

Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, *or may hold such representation votes*, as it considers appropriate.

(emphasis added)

Proceeding under either of subsection (4) or (6), therefore, the Board would have the power to amend a description of one of the bargaining units to the extent necessary to eliminate the conflict in bargaining rights, either after a representation vote, as the Labourers' Union urges, or without one, as the Teamsters submit.

15. In the present case, there is a degree of "intermingling" in the sense that a small number of drivers normally working under the Labourers' collective agreement in St.

Catharines are, in effect, “borrowed” from time to time to supplement the Hamilton Cargo operation. This occurs only “occasionally”, and the drivers are dispatched out of the Hamilton terminal when it does happen. The original business of Hamilton Cargo accordingly remains a distinct and identifiable one, as well as being, in the words of Mr. Neal, 90% run by persons formerly employed under the provisions of the Teamsters’ collective agreement. In dealing with this interim situation, therefore, the Board does not consider it appropriate or necessary to direct the taking of a representation vote. Rather, the Board considers it appropriate to amend the description of the bargaining unit contained in the collective agreement of Labourers’ International Union Local 1267 to specifically exclude the business formerly operated by Hamilton Cargo Transit Limited.

The Board accordingly:

- (i) declares that a sale of a business has taken place within the meaning of section 63 of the Labour Relations Act between Hamilton Cargo Transit Limited and 268121 Ontario Limited, and that the applicant is accordingly entitled to give notice to bargain to 268121 Ontario Limited;
- (ii) declares that the existing collective agreement between 268121 Ontario Limited and Labourers’ International Union of North America Oil and Gas Service Domestic & General Workers Union Local 1267 be amended in its scope clause to read:

#### ARTICLE 1 - RECOGNITION

1.01 The Company recognizes the Union as the sole collective bargaining agent of all employees of the Company employed at or working out of Mississauga, Brampton, Hamilton, St. Catharines, Niagara Region and Metropolitan Toronto, save and except foreman, persons above the rank of foreman, office staff and shop employees, persons employed in the business formerly operated by Hamilton Cargo Transit Limited in Hamilton, and persons regularly employed for not more than twenty-four (24) hours per week.

16. With respect to Cole Equipment Rental Company Limited, the Board finds that any application to have that company declared either a successor or a related employer would be premature at this time, and the request to add Cole as a respondent is accordingly denied.

17. The separate opinion of Board Member F. W. Murray will follow.

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**1589-81-OH** Richard Arnold and Other Members of Local 127 U.A.W. International Harvester Bargaining Unit, Complainants, v. **International Harvester Company of Canada, Limited**, Chatham, Ontario, Respondent.

Health and Safety - Employees refusing to work due to presence of gasoline fumes  
 -Employer's direction to return to work or lose pay at first - tier investigation stage unlawful  
 -Employer shutting down plant and sending employees home without pay pending ministry investigation - Employer response not unlawful in circumstances - Question of entitlement to be paid during investigation procedures not decided

**BEFORE:** Corinne F. Murray, Vice-Chairman, and Board Members L. Hemsworth and S. Cooke.

**APPEARANCES:** *Jim Gill for the complainants; E. L. Stringer, Q.C., B. Crosby, J. Vanest and J. Crete for the respondent.*

**DECISION OF CORINNE F. MURRAY, VICE-CHAIRMAN, AND BOARD MEMBER S. F. COOKE;** June 24, 1983

1. This is a complaint pursuant to section 24 of the *Occupational Health and Safety Act*, R.S.O. 1980, c.321 (hereinafter referred to as "the Act").

2. All the complainants were employed by the respondent and were at work at the commencement of the day shift on December 10, 1980. They were a group who refused to continue to work that day because of the smell of gasoline fumes in the respondent's plant in Chatham. They complain that a penalty was imposed on them contrary to section 24(1)(c) as a result of their refusal because they did not receive their regular wages for their scheduled hours of work between 9:30 a.m. and the decision of the inspectors from the Ministry of Labour (5 p.m. on December 10, 1980). These complainants were not named but counsel for the respondent estimated that they numbered about 50. Mr. Gill did not dispute this approximation. For ease of reference this group of employees will be referred to as refusers.

3. Richard Arnold, in addition to the complaint he has as a part of the group of refusers, complains that he was intimidated on December 10, 1980 by Robert Coutts, his General Foreman, contrary to section 24(1)(d). He also claims *individually* that he was penalized contrary to section 24(1)(c) for exercising his right to refuse to work pursuant to the Act on December 10, 1980, because he should have received his full pay for the hours between the time he left the respondent's plant (approximately 9:30 a.m.) and the time when the inspectors of the Ministry of Labour made their decision regarding the condition of the respondent's plant. Since Mr. Arnold was a part of the group of complainants identified in paragraph 2 above, the Board has decided to treat Mr. Arnold's claim for compensation for the hours between 9:30 a.m. and 5 p.m. as an alternate claim to that of the group.

4. Finally, complainants Robert Tindale, Chairman of the Plant Committee for Local 127 U.A.W. International Harvester Bargaining Unit, (hereinafter referred to as "Local 127") and Harry Warner, Safety Chairman for Local 127 alleged they were threatened with discipline contrary to section 24(1)(b), on December 10, 1980, by Joe

Vanest, Manager of Human Relations for the respondent in Chatham and Richard Tolhurst, Manager of Manufacturing Operations in Chatham.

5. The events that directly bear upon the allegations are those which occurred on December 10, 1980 at the respondent's truck manufacturing plant in Chatham. However, counsel for the respondent in his opening statement said that the events of December 9, 1980 provided general background to understand what took place on the next day. Counsel for the respondent invited the complainants' counsel to take issue with his description of events and indicated that while he would be calling no evidence regarding December 9th, he would not object to his witnesses being cross-examined by the complainants or questioned by the Board regarding the events of December 9th. Counsel for the complainants did not take issue with the description the respondent's counsel gave of December 9, 1980 nor did the complainant's counsel cross-examine any of the respondent's witnesses who mentioned the events of December 9, 1980. It was undisputed that on December 9, 1980 the respondent had shut down the plant at approximately 11 a.m. because of concerns about a strong odour of gasoline in Department 6, the Press (Sheet Metal) Shop, in the main Chatham plant. Prior to making the decision to shut down, there had been a work refusal pursuant to the Act in Department 6 because of the gasoline fumes but the respondent shut the plant down because it could not determine the cause of the fumes and whether there was a safety problem. While the plant was shut down on the 9th, external engineers, who had been retained by the respondent, came to the plant and measured with testing equipment whether the fumes were hazardous. A number of remedial measures were taken by the respondent on the 9th and early on the 10th and the respondent was satisfied it could resume operations on the 10th at or about 6:30 - 7:00 a.m.

6. At about 7:30 a.m. on December 10th, Harry Warner and another representative of Local 127 asked John Ancocik, Supervisor of Safety & Security for the respondent's Chatham plant, to provide them with the engineers' test readings from the night before. After a short discussion (between 7:30 and 8:00 a.m.) among various officials of the respondent and Local 127, these readings were made available to Mr. Warner and other officials of Local 127. The respondent's officials took the position in this meeting that the plant had been confirmed as safe by the engineers. The respondent also at this point directed the engineers, accompanied by Mr. Ancocik and Mr. Warner, to continue taking tests of the storm drains (the believed location of the problem of fumes the day before).

7. At approximately 8 a.m. Mr. Vanest informed Mr. Ancocik, Mr. Warner and other officials of both the respondent and Local 127 who had gathered to discuss the engineers' test results that there was a work stoppage in the Harcan building, a building separate from the main Chatham plant. Mr. Ancocik and Mr. Warner left immediately to investigate. They removed a storm drain cover in the Harcan building and could not smell any gasoline fumes and, consequently, the employees assigned to work in this building were persuaded to return to their duties.

8. After the Harcan incident was over, Mr. Ancocik, Mr. Warner and the personnel from the engineering firm were about to resume testing in the respondent's main plant when Mr. Vanest reported by walkie-talkie that employees in Departments 3 (the Cab and Panel Department), 50 (the Frames and Axle Department) and 53 (the

Chassis line) in the main plant building had stopped work. He directed Messrs. Ancocik and Warner to go to those Departments. By the time Mr. Ancocik, Mr. Warner and the sundry others reached these departments, all the employees had left the plant altogether. Mr. Ancocik reported this to Mr. Vanest via walkie-talkie and Mr. Vanest directed him to come to his office. We will divert at this point from events generally to the incidents relating particularly to Mr. Arnold because the actions complained of by Mr. Arnold allegedly occurred at or around this point in time.

9. Mr. Arnold has been employed by the respondent for 12 years, 11 of them in Department 50. At approximately 6:20 a.m. on December 10, 1980, he came to work and immediately noticed that the smell of gasoline was "very strong" in his Department. Nevertheless he proceeded to his work area. By approximately 7:00 a.m. his concern about the fumes caused him to call the union office (at the plant) and inform the safety committee about the strong fumes. He was told that the union's safety committee was already out in the plant checking on the fumes. Mr. Arnold also complained to the three foremen to whom he usually reported - Robert Locke, John Jeans and Ken Burns - about the fumes. These three foremen are supervised by Robert Coutts, the General Foreman. At approximately 7:15 he saw Mr. Warner and others in Department 50. He approached Mr. Warner and told him about the strong fumes, following which he returned to his work area and again complained to his three foremen about the excessive fumes. Mr. Arnold testified that "nothing materialized" either from the union or the respondent by 8:00 a.m. so he told the foremen that he felt the plant was in an unsafe condition and, particularly, that he felt his own work area was unsafe. He advised them that under "Bill 70" he was removing himself to a safe area. The safe area he selected was the gatehouse outside the plant. It seems that Mr. Arnold was acting independently of any of the rest of the employees in Department 50 because there is no evidence he consulted with any of these employees or was joined at this time by any of them in leaving the plant. At some point after Mr. Arnold removed himself to the gatehouse, the other employees who refused to work in Departments 3, 50, and 53 also sought safety in this vicinity as well.

10. Shortly after he arrived at the gatehouse, Mr. Arnold was told by the security officer there that his foreman was telling him to get back to his job. Mr. Arnold asked and received permission to use the phone in the gatehouse. He called the union's office and told Bob Tindale that he was out in the gatehouse under Bill 70 because of the excessive fumes. Mr. Tindale said he knew Mr. Arnold was out there and that the safety committee would be out to see him shortly. Apparently he gave him no advice or guidance on what his attitude should be if his foreman was directing him back to work. While at the gatehouse, Mr. Arnold was approached by Mr. Coutts and Mr. Locke. There is no dispute that Mr. Coutts advised Mr. Arnold that engineers had tested the plant and had pronounced it safe. Mr. Arnold informed Mr. Coutts that until the "proper authorities" (by whom he says he meant the Ministry of Labour) advised him that the plant was safe, he would remain where he was. It is also not disputed that Mr. Coutts ultimately told Mr. Arnold that his "time was stopped", which meant he would receive no more pay for the day. What happened prior to this statement is in dispute.

11. Mr. Arnold testified that after he told Mr. Coutts he was waiting for the proper authorities to confirm the plant's safety, Mr. Coutts got very red in the face and gave him "a direct order to return to his job". Mr. Arnold said that he responded to this order by explaining his position under Bill 70 a second time. Mr. Coutts then told him to



accompany him to Mr. Vanest's office, at which point Mr. Arnold requested his union committeeman. Mr. Arnold claimed that it was at this point Mr. Coutts told him his time was stopped. He said he made the request for his committeeman because he felt that he was going to Mr. Vanest's office to be fired. Mr. Arnold described himself to be "shaking". Mr. Coutts and Mr. Locke both testified about this encounter. Mr. Coutts confirmed that he told Mr. Arnold twice that he would have to go back to work. When Mr. Arnold refused and requested his committeeman, Mr. Coutts told him that he would have to go to the Personnel office. Mr. Coutts said that he told Mr. Arnold this because he wanted "to leave" Mr. Arnold in the Personnel office and go get Mr. Arnold's steward. Mr. Locke testified that the reason for taking Mr. Arnold to Personnel was to allow "them" to make a ruling or a judgement on where "they" would go from there. He also indicated that it was after Mr. Arnold requested the committee man that Mr. Coutts and he took Mr. Arnold to Personnel. Both Mr. Coutts and Mr. Locke deny that Mr. Coutts was red in the face, angry, frustrated, lost his cool or had a higher pitch to his voice during any part of this encounter. They both described his manner throughout as normal and business-like.

12. The evidence of Gerry Nagle, the respondent's Labour Relations Manager, is relevant with respect to determining the effect of Mr. Coutts' actions vis-a-vis Mr. Arnold, because if Mr. Nagle's evidence is to be believed, he countermanded any directives given by Mr. Coutts to Mr. Arnold that he was required to go back to work. According to Mr. Arnold's testimony, Mr. Nagle could not countermand any of Mr. Coutts' directives because Mr. Nagle preceded Mr. Coutts in visiting Mr. Arnold at the gatehouse. Mr. Arnold claimed that prior to Mr. Coutts' arrival at the gatehouse and after he placed his call to Mr. Tindale at the union's office, Mr. Nagle came into the gatehouse and advised him that the union's safety committee and the engineering firm had conducted tests of the plant and confirmed its safe condition. He advised him that he should return to work. Mr. Arnold says he told Mr. Nagle that he felt the plant was in an unsafe condition and that until he was notified by the "proper authorities" (meaning Ministry of Labour inspectors), he had the right to refuse to not go back into the plant. Mr. Arnold described Mr. Nagle as getting "frustrated" at his response and, as he left the gatehouse, saying that as far as he was concerned, Mr. Arnold could stay out there for 30 years. About 5 minutes later, Mr. Coutts and Mr. Locke entered the gatehouse and the encounter set out in the preceding paragraphs happened. According to Mr. Arnold, on the way to the Personnel office and after he had conferred with a committeeman for Local 127 about his situation, Mr. Nagle reappeared. He told Mr. Arnold and the committeeman that he would meet with them shortly, but that first he had to go out to the plant because there was a work stoppage in progress. Mr. Arnold indicated again that he was removing himself from the plant and that he was seeking the safety of the gatehouse. Mr. Arnold did this and joined a group of employees gathered there.

13. Mr. Nagle testified that his purpose in going to see Mr. Arnold was to "rectify the situation" created by Mr. Coutts' direction to Mr. Arnold that he go back to work. He claimed he had a previous conversation with Mr. Coutts during which Mr. Coutts reported that he had directly ordered Mr. Arnold to return to work, even though Mr. Arnold had said he was refusing to work under the Act. (It should be noted that Mr. Coutts testified in reply, without objection, to rebut the testimony of Mr. Arnold and therefore did not give any evidence regarding this conversation he had with Mr. Nagle.) Mr. Nagle said he was "immediately concerned" at what Mr. Coutts had done "because of

the provisions of the Act". Mr. Nagle testified that when he met with Mr. Arnold at the gatehouse, he simply "reinforced with Mr. Arnold" his rights under the Act, i.e., if he felt there was a problem, he had every right to leave the operation and to stay in the gatehouse which he had chosen as the safe place to go. Under cross-examination Mr. Nagle said that he thought he told Mr. Arnold the test results by the engineers showed that the fumes were within acceptable limits, but he denied making any suggestion, based on the results, that Mr. Arnold return to work. Mr. Nagle said that after he "reinforced" Mr. Arnold's rights, he left the gatehouse. Mr. Nagle gave no evidence as to a subsequent encounter with Mr. Arnold in the company of the steward. Mr. Arnold was asked in cross-examination whether he disagreed with Mr. Nagle's evidence that he met with Mr. Arnold after Mr. Coutts gave his directives and Mr. Arnold said he disagreed with it "100 per cent".

14. If we accept the sequence of events as described by Mr. Coutts and Mr. Locke, there would have been no opportunity for Mr. Nagle to "rectify the situation" created by Mr. Coutts until after Mr. Arnold had returned to the gatehouse because Messrs. Coutts and Locke were with Mr. Arnold continuously. We find it unlikely that Mr. Nagle met with Mr. Arnold after he went to the gatehouse a second time because, according to the chronology of the day described by witnesses for both the respondent and the complainant, employees who were refusing to work, in addition to Mr. Arnold, began to leave their work areas and the plant at approximately 8:15 a.m. - 8:30 a.m. A meeting between the respondent's officials and the officials of Local 127 to consider this situation took place in Mr. Vanest's office at approximately 8:45. Mr. Nagle claimed he was at this meeting for 90-95% of its duration. Immediately after this meeting, Mr. Nagle, Mr. Ancocik, Mr. Warner and Mr. Tindale went out to the gatehouse area to address the refusers. While it is possible that Mr. Nagle could have returned to the gatehouse in the half hour between 8:15 and 8:45, we find it is unlikely he would have, at that point in time, spoken only with Mr. Arnold when other refusers were nearby. More importantly, considering the perception of events officials of the respondent had prior to and during the 8:45 a.m. meeting and the reasons for Messrs. Nagle, Ancocik, Warner and Tindale speaking to the refusers after the meeting, it is unlikely Mr. Nagle would have spoken to Mr. Arnold in the terms he said he did.

15. We have concluded that the prevailing view among the respondent's officials until approximately 9:30 was that the employees who were refusing to work ought to return to work, or, put another way, that the employees should return to work because they had no reason to fear for their safety since the plant was in fact safe. It is clear that during the meeting in Mr. Vanest's office Mr. Vanest indicated that the employees should return to work because the plant was determined by the engineers to be safe. Mr. Vanest testified he received word that several employees had left their work areas and the plant at approximately 8:15 a.m. He immediately called Mr. Tindale and asked if he knew why employees were leaving the plant. He said Mr. Tindale claimed he did not have very good information and he said he would come up to his office immediately. When Mr. Tindale arrived in Mr. Vanest's office at approximately 8:45, Mr. Vanest told him he was not sure what they were dealing with. Mr. Vanest claimed that he continued not to know what he was dealing with until after Messrs. Nagle, Ancocik, Warner and Tindale returned from addressing the refusers (following the meeting) at approximately 9:30. Between 8:30 and 9:30, as the circumstances were assessed, he said he and other officials of the respondent came to the conclusion that the work stoppage "should be treated as a work refusal under

the Act". It is clear that while the respondent's officials may have been in doubt as to why the employees were stopping work, there was a consistent attitude that the employees should be at work. Mr. Nagle was a part of the respondent's managerial team which considered, at least until 9:30 a.m. on December 10th, that the plant was safe and that the refusers should resume work. We have concluded Mr. Nagle would have acted consistent with the prevailing view. Firstly, Mr. Vanest testified that as of 7:30 a.m. he, Mr. Nagle and other officials of the respondent were trying to persuade Mr. Warner and other Local 127 officials that the plant was safe, relying on the engineers' test results. In all probability the decision was made to give the engineers' test results to the union and to invite Mr. Warner to accompany the engineers on further testing so that Local 127 could be persuaded that the plant was indeed safe. Secondly, Mr. Nagle testified that the purpose of a four-man delegation (including himself) meeting with the refusers congregating at the gatehouse was to persuade them the plant was safe and that they should return to work.

16. For these reasons we find it unlikely that Mr. Nagle would have before 8:45 a.m. (the only time at which he could have spoken to Mr. Arnold) become immediately concerned at Mr. Coutts' directives to Mr. Arnold, and it is equally unlikely that he would have, in the face of Mr. Arnold's refusal, simply advised Mr. Arnold that it was his right under the Act to refuse to work if he felt conditions were unsafe. We therefore conclude that Mr. Arnold was directed back to work by Mr. Coutts and told that his pay would be stopped if he did not do so. Mr. Nagle did not subsequently advise Mr. Arnold that these directives did not have to be followed, nor did he, in any other way, rectify the actions of Mr. Coutts. We find that Mr. Arnold was told he would have to go to Personnel or Mr. Vanest's office and at some point (when is not important) he requested a committeeman. We find that the purpose of his going to the Personnel office was not explained to him. We find that the purpose was to have someone higher up the management ladder determine what, if anything, would happen to Mr. Arnold in the circumstances.

17. The allegations that Messrs. Tindale and Warner were threatened by Messrs. Vanest and Tolhurst allegedly occurred during the meeting referred to above, which took place at approximately 8:45 a.m. in Mr. Vanest's office. In this regard we heard extensive and conflicting evidence as to what was said and what happened at this meeting. We will not set out the full evidence on this issue because even if the evidence, as given by Mr. Tindale and Mr. Warner, were found to be the correct version of what happened at the meeting, they could not be successful in arguing that they were threatened with discipline. Mr. Tindale testified that Mr. Vanest said he considered what the refusers were doing was an illegal work stoppage for which they would receive discipline. He also testified that Mr. Vanest told him that if he and Mr. Warner did not get the people back and the crucial production line had to be shut down, the discipline imposed would be more severe. Mr. Warner, interestingly enough, did not mention any such threats by Mr. Vanest. He testified that it was Mr. Tolhurst who said that if the line went down, the penalties would be more severe. Neither Mr. Warner nor Mr. Tindale relayed these statements to the refusers, so it cannot be said that the refusers were threatened by Mr. Vanest or Mr. Tolhurst through Mr. Warner or Mr. Tindale. Mr. Tindale admitted that the threats he was alleging Mr. Vanest to have made were not directed at him personally, but rather to the refusers. We conclude, considering all of the evidence, that Mr. Warner also could not have concluded Mr. Tolhurst's alleged statements to have been directed at him. On this basis we have concluded that portion of the complaint alleging threats to Mr. Warner and Mr. Tindale to be unfounded.



18. It is undisputed that all employees, whether the group of refusers or the ones sent home as a result of the refusal, were not paid their regular hourly rate for the hours after 9:30 a.m. on December 10th. All employees (except Mr. Arnold) left the plant on December 10th not knowing whether or not they would be paid anything for the hours after 9:30. The respondent explained the alternate method of payment to the employees in these terms on December 15, 1980, (Exhibit 4):

December 15, 1980

TO ALL CHATHAM PLANT EMPLOYEES

On Wednesday morning, December 10, 1980, at 9:30 a.m. we had to cease plant operations because a few employees left key operations in Departments 3, 50 and 53. They stated that they were concerned about gasoline fumes in the plant.

This interruption occurred in spite of actions taken and assurances by the Company that the plant was safe. The under-floor lines had been flushed Tuesday and fume detection readings confirmed there was *no hazard present*.

When our appeals and those of your Union leadership were unsuccessful in convincing these employees to return to work we had no recourse other than to suspend operations and send our employees home.

When production operations are suspended in conditions such as occurred on Wednesday, pay is affected. Accordingly, regular hourly pay for all employees ceased as of the time they were sent home and an S.U.B. Short Work Week Benefit will be paid to those eligible. This payment will appear in cheques released on Tuesday, December 23, 1980.

"J. O. Vanest"

The relevant portions of the S.U.B. Plan which were interpreted by the respondent to be applicable to the situation prevailing on December 10th are:

Section 3 - Conditions With Respect to Layoff

- (a) A layoff for the purposes of this Plan includes any temporary layoff, layoff resulting from a reduction in force, or from the discontinuance of a Plant or operation, or a layoff occurring or continuing because the Employee was unable to do the work offered by the Company although able to perform other work in the Plant to which he would have been entitled if he had had sufficient Seniority;
- (b) An Employee's layoff for all or part of any Week will be deemed qualifying for Plan purposes only if:

- (1) such layoff was from the Bargaining Unit;
- (2) such layoff was not for disciplinary reasons, and was not a consequence of:
  - (i) any strike, slowdown, work stoppage, picketing (whether or not by Employees), or concerted action, at a Company Plant or Plants, or any dispute of any kind involving Employees or other persons employed by the Company and represented by the Union whether at a Company Plant or Plants or elsewhere;
  - (ii) any fault attributable to the Employee.

Not all employees were eligible under the Plan for payment, however. Due to the low amount of funding in the Plan, in order for any employee to receive any short work week benefits, he/she had to have 10 or more years seniority. Mr. Arnold, for one, did not have sufficient seniority at that time, so he received no pay beyond 9:30 a.m. (while, initially, he was not paid even for the space of time between 8:00 and 9:30, he grieved, and this was ultimately rectified short of arbitration). The complainants do not dispute that the Plan requires this seniority. They claim that the respondent acted contrary to the Act in applying the Plan to them. When Mr. Vanest was questioned about how the decision on the method of payment for employees that day was conveyed to the union, he said that he and Mr. Tindale had a discussion at 3:30 p.m. on the 10th recapping what had happened that day. He claimed that Mr. Tindale asked him the question: "Are they going to be paid a short work week?" (a reference to the short work week payment under the S.U.B. plan). Mr. Vanest says that this is the first mention of the short work week payment in any communication with Local 127 officials or refusing employees. Apparently Mr. Vanest could not give a definite answer to this question until about a week later because he had never handled a mass refusal to work like this before and he had to await the collection of information and advice from the respondent's head office in Hamilton. The Board received no evidence as to how hours not worked on December 9th were treated in terms of pay.

19. Part of the complainants' basis for claiming entitlement to a full day's pay is their right, as refusers, to participate in the inspection process. Therefore, it is necessary to describe briefly that process as it unfolded on the 10th. The inspectors were called in Windsor at approximately 9:00 a.m. on December 10th by the respondent. Both Mr. Warner and Mr. Tindale knew the Ministry inspectors had been called. No evidence was led by the respondent as to whether it was known how long it would be before an inspector arrived. They arrived at the plant between 11 a.m. and 11:20 a.m., 1-1/2 hours after virtually all the employees had gone home. They asked Mr. Ancocik and Mr. Warner where the refusers were. Mr. Ancocik replied that so many employees had refused to work that the respondent was forced to send the whole plant home. The inspectors told Mr. Ancocik to call in three employees who would be representative of the employees who had refused because of unsafe conditions. Although Mr. Warner was present, he did not voice any objections to the number or selection of employees for this task at this or any other time. Mr. Ancocik said that three employees (none of whom was Mr. Arnold) were called in for 1 p.m. At 1 p.m. the Ministry inspectors, Mr. Ancocik, Mr. Warner and the three employees who had been called in assembled in the coffee room.

Questions were asked and answers given as to the events of the 10th. Mr. Ancocik testified that employees explained why they felt there was a hazard on the basis of the gasoline fumes. After the meeting, the group proceeded to the work areas to perform a "sniff test". At 5 p.m. they wrote up an order that the respondent ventilate and purge the sewer system. The three employees and Mr. Warner were paid for the period of time they participated in the investigation.

20. The respondent argued that it was not required to pay the complainants beyond 9:30 a.m. because they were not at the plant premises beyond this point in time. The respondent argued in an alternative way as to the reason the refusers were not at the plant beyond 9:30 a.m. The respondent argued that the evidence showed that the complainants were never directed to leave; so that they really left of their own accord and, alternatively, even if the respondent did direct them to leave, the respondent was entitled to give such a direction under section 23(10) of the Act. We have reviewed the evidence of the respondent's witnesses and have come to the conclusion that the respondent gave a general direction to all the employees (refusers and non-refusers) that they could go home. Mr. Ancocik testified that his response to Ministry inspectors' inquiries as to the whereabouts of the refusers was that there had been so many people off key operations the entire plant was "sent home". Mr. Vanest, in response to questioning by Mr. Hemsworth about what had happened with previous individual refusers pursuant to the Act, testified that the individuals had remained in their work area so that their "time" continued and so did their pay. He went on to comment that he had never run into a situation, before December 10th, where individuals were "sent home" prior to the conclusion of the shift, except on December 9th. While both Mr. Arnold and Mr. Cammart (another witness called by the complainants who was a part of the group of refusers) could not tell the Board who specifically directed them to go home, both felt that this directive had come from the respondent. This basically coincides with the language used by Messrs. Ancocik and Vanest in describing what happened to the refusers on December 10th and also the language used in Exhibit 4 (see paragraph 18, *supra*) to the effect that "all employees" were sent home. Therefore, we conclude that the respondent did send the refusers home on December 10th at or about 9:30 and stopped their normal pay at that point. We also find that Mr. Warner and Mr. Tindale knew that the respondent was going to send everyone home if the refusers could not be persuaded that the plant was safe. Mr. Warner gave extensive evidence regarding his knowledge of and training in the procedures of the Act. There is no evidence that either informed the respondent or any of the refusers of the refusers' right to be present for a Ministry investigation.

21. Relevant portions of Sections 23 and 24 of the Act state:

• • •

23. (3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or



- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of his refusal to work or do particular work continues to be likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4)(a), (b) or (c).

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person.

(9) The inspector shall give his decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause (4)(a), (b) or (c).

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or

- (b) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

(11) Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the equipment, machine, device or thing or to work in the work place or the part thereof which is being investigated unless the worker to be so assigned has been advised of the refusal by another worker and the reason therefor.

(12) The time spent by a person mentioned in clause (4)(a), (b) or (c) in carrying out his duties under subsections (4) and (7), shall be deemed to be work time for which the person shall be paid by his employer at his regular or premium rate as may be proper.

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;

- (b) discipline or suspend or threaten to discipline or suspend a worker;

- (c) impose any penalty upon a worker; or

- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

22. The claim for regular wages between 9:30 a.m. and 5 p.m. on December 10th is a novel claim which has not thus far been raised in any reported decision of the Board

either under the Act or under its predecessor *The Employees' Health and Safety Act*, S.O. 1976, c.79. With the exception of one decision (*Canadian General Electric*, [1981] OLRB Rep. June 616), our decisions thus far have required a determination of whether refusing employees had reason to believe that their work places presented a hazard to their safety. Where it was found that the refusal was based on a reasonable belief, and therefore, the discharge or discipline imposed on the employee for engaging in a work refusal was found to be unlawful, compensation has been ordered for wages lost due to the discharge or discipline with or without reinstatement (see, for example, *Canadian Gypsum Construction*, [1978] OLRB Rep. Oct. 897 and *AMS Diamonds*, [1981] OLRB Rep. Nov. 1534). In *Canadian General Electric*, supra, there was no dispute that the shutdowns were necessary to remedy acknowledged hazardous conditions. The shutdowns were by agreement of the employer and the union (who was the complainant) and, therefore, the time lost was not for the purposes of an investigation by either the employer or Ministry of Labour inspectors. The Board found no penalty was imposed on the employees when they were paid a day rate for the time instead of an average of their incentive rates because they were treated the same as any employee under the collective agreement who had "lost or idle time" due to circumstances beyond their control (the words of the collective agreement). Even if a penalty, this treatment of the hours of shutdown was not found to have been done because the employees sought compliance with the Act. The respondent, throughout the proceedings before us, never took the position that the complainants' refusal to work on December 10th was not based on a reasonable belief that the gasoline fumes were likely to endanger them. We therefore have concluded, for the purposes of section 24, that the complainants were, during all relevant times, "acting in compliance with the Act".

23. Section 23 sets out a code of conduct for employees and employers where employees have reasonable concerns about hazards to their health and safety in their work places and their employers disagree. First of all, employees can refuse to work but must report the circumstances of that refusal to their supervisors. Section 23 provides for a two-tiered investigation - initially by the employer immediately upon receiving the employee's report, and subsequently by Ministry of Labour inspectors after a continuation of the refusal. While the first tier occurs, the refusing employee must remain at a safe place near his work station (subsection 5) except, presumably, when his presence during the investigation requires something else (subsection 4). The employer, during this time, is given no right to assign alternate work, presumably because this would interfere with the employee's presence at the investigation and because the time taken up in the investigation is totally within the control of the employer. If, after this investigation, the employee continues to refuse to work because he has reason to believe his work or work place puts his safety in jeopardy and the employer continues to disagree with the employee's belief, then the inspectors from the Ministry must be called in. Pending this second-tier investigation, the employer can either assign "reasonable alternative work" or, where none is practicable, "other directions" which do not violate section 24. These options were made available at this stage presumably because the inspection might not get underway immediately and its duration, up to and including the inspectors' decision, is not fully within the employer's control. Once the inspector commences the investigation, it must proceed in the presence of the refusing employee (subsection 7). Therefore, while the employee (who continues to refuse after the first-tier investigation) may be directed to do other work or be given any other lawful direction prior to the commencement of the investigation or after its conclusion, he retains the right to participate in the investigation itself.



24. Section 24 ensures that an employee who properly seeks to utilize or has utilized section 23 is not interfered with through dismissal, suspension or other discipline, threats of dismissal, suspension or other discipline, penalties or intimidation because he/she is acting in accordance with the Act. It is important to note that section 24 does not provide remedies for failure to follow the procedures of section 23. Section 37 does. It provides that:

37.-(1) Every person who contravenes or fails to comply with,

- (a) a provision of this Act or the regulations;
- (b) an order or requirement of an inspector or a Director; or
- (c) an order of the Minister,

is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than twelve months, or to both.

(See, for example, *R v. Algoma Steel Corporation Limited*, (unreported), released January 22, 1981, Boyd, Prov. Ct. J.; *R v. Ornamental Precast Limited*, (unreported) released March 1981, Greco, Prov. Ct. J.). It provides that a person who contravenes or fails to comply with the Act is subject to a summary conviction punishable with fine and/or imprisonment. Our jurisdiction is not to remedy breaches of the Act (in particular section 23) but, rather, to determine whether section 24 has been violated. Similarly, proving section 23 has not been followed will not result in a finding that section 24 was violated. Proof that the procedures of section 23 were not followed, however, could be an ingredient in a determination that section 24 has been breached. A failure to follow the steps set out in section 23 would have to be explained and that explanation weighed with all the other evidence to assess whether section 24 had been violated.

25. Between the initial work refusal and the decision of the inspector, the refusing employee and the employer are essentially locked in a contest of persuasion. Each must assess the situation and make difficult judgement calls. If at any time the employer correctly assesses the employee's beliefs as unreasonable, the full range of disciplinary action is available and this Board will not have any jurisdiction to interfere. Since employees only have the protection of the Act in circumstances where they can show their beliefs were reasonable, the Act provides for the employee's participation in both tiers of investigations. The Board has recognized in previous decisions (see, for example, *Canadian Gypsum Construction*, *supra*) that after the completion of the first tier of investigation, there is an increased onus on the refusing employee to show that the refusal is reasonable. The limitations on what techniques the employer can utilize to persuade a refusing employee are set by section 24.

26. We note that Mr. Arnold specifically denied that he was seeking to rely on section 24(1)(c) for the loss of pay he experienced for the time between 8:00 and 9:30 a.m. on December 10th, notwithstanding the fact that his pay was withheld for this period of time until settlement of his grievance. We therefore only must consider his claim that he was intimidated contrary to section 24(1)(d). We have found on the evidence that Mr. Coutts directed Mr. Arnold back to work repeatedly and threatened to stop his pay if he

did not do so. These directions occurred during what was for Mr. Arnold the first-tier investigation stage, a time during which the employer is given no right to assign the refusing employee alternate work or give any other directions normally available to employers. It is obvious from the design of section 23 that an employer also cannot direct an employee who is rightfully refusing to work, pursuant to section 23(3), to return to his work. The Act gives employees the right to refuse to work in reasonable circumstances and the direction by an employer that an employee cease to refuse to work negates this right.

27. As pointed out earlier, proof of violation of section 23 does not necessarily lead to the conclusion that section 24 has been violated. We have concluded that these directions did amount to intimidation. The relationship between an employer and an employee is one where normally the employer has the right to direct the employee to do work and the employee has the obligation to comply with the direction. Where an employee refuses to comply, the employer can not only stop the employee's pay and send the employees home, but also can take disciplinary action. One of the longstanding exceptions to these consequences is in the areas of health and safety insofar as organized employees are concerned. Arbitrators have recognized that discipline should not be upheld where the refusal to work arises out of a reasonably held belief that work conditions are unsafe. Section 24 applies this standard to the unorganized employees and also applies further limits on employers' actions in this area. Not only is disciplinary action forbidden but also actions that are coercive, intimidating or amounting to a penalty. We interpret this extension to be reflective of a legislative intent to eliminate actions by an employer which pit the power of the employer over the employees' work life against the employees' stamina to stand up for their statutory rights. We find the repeated order to return to the very work which Mr. Arnold had an undisputed statutory right to refuse, accompanied by the threat that his pay would be stopped if he did not do so, is beyond the boundaries of persuasion and is an intimidating action. The threat that his pay would stop was tantamount to sending him home and was a graphic illustration of the respondent's control over his work life. The direction that Mr. Arnold accompany Mr. Coutts to Personnel in these circumstances could reasonably be interpreted to be a sign that the situation was escalating to a more serious level and could entail disciplinary action. If Mr. Coutts' intention was as he described it to us, we would have thought that the purpose of the trip to Personnel would have been explained. We find that the real purpose was as stated by Mr. Locke, i.e., to have someone higher up decide what to do with Mr. Arnold. On these facts we have therefore decided that the respondent has violated section 24(1)(d) in connection with Mr. Arnold.

28. We will now deal with the claim by the refusers for payment for the period of time between 9:30 a.m. and 5 p.m. on December 10, 1980. In this regard it is important to note that there was no claim made for payment in connection with the early termination of the plant's operations on the previous day, December 9th, and there is no general claim that so long as an employee is rightfully refusing to work pursuant to the Act, he or she is entitled to be paid, even after an inspector has rendered a decision pursuant to section 23(4).

29. The complainants did not argue that they were in the first-tier investigative stage at 9:30 on December 10th. Presumably, they recognized that the events of December 9th and the call to the Ministry of Labour rendered the first tier redundant. The primary argument of the complainants is that an employer can *never* direct properly

refusing employees to go home without pay where the Ministry investigation is pending and there is no reasonable alternative work available, because such a direction is always a penalty within the meaning of section 24. The complainants do not dispute that there was in fact no reasonable alternative work for them on December 10th. They say that notwithstanding this, the respondent imposed a penalty on them by directing them to go home because the words “other directions” in section 23(10) do not encompass such a direction. We cannot agree that an employer, faced with a work refusal, especially of this magnitude, could *never* direct employees home while the Ministry inspection or decision was pending and where there was no alternative work available. If the Legislature had intended absolutely to outlaw such an accepted and common employer response to a lack of work situation, it would have expressed this intention in a less oblique way. We have concluded that section 23(10)(b) permits an employer, in the proper circumstances, to give a full range of “other directions” to employees who are rightfully refusing to work and for whom no alternate work is available. One of these directions could be laying off the employees while the inspectors are awaited. Other directions might include attendance at the nurse’s or doctor’s office or conferring further with the employer’s safety officials or experts dealing with the situation. The right to lay off refusing employees for whom no alternate work is available (and subject to seniority rights in the collective agreement), is not unqualified. It cannot be exercised in contravention of section 24. Therefore, employees cannot be laid off in a fashion which amounts to a penalty or discipline. For example, if the employer has normally paid an employee who has been sent home because there is no work due to a power failure, the employer could not (all other things being equal) send home, without pay, an employee refusing to work pursuant to the Act without risking being found in violation of section 24. In those circumstances an otherwise lawful direction could be transformed into a penalty contrary to section 24 if the change of approach was motivated by a desire to punish the refusing employee for using the procedures of the Act.

30. The secondary argument of the complainants is that the direction that they go home interfered with their right to be present for the Ministry inspection and that they were penalized to the extent that they did not participate and were denied the pay they would have received if they had participated. As we have already stated, section 24 is not an “enforcement” provision for the procedures laid down in section 23 or any other section of the Act. Therefore, the only way in which the complainants could succeed on this argument is to argue that the reason why the respondent directed the refusers home was to eliminate their participation in the Ministry investigation. Section 24 provides that a penalty must have been imposed *because* employees were acting in compliance with the Act. The complainant asked us to find “anti-safety” motivation from the fact that proper procedures laid down in section 23 were not followed.

31. The onus of explaining or proving that a direction to refusing employees, pursuant to section 23(10), is not intended to and does not penalize properly refusing employees is upon the employer by reason of section 24(5). We are satisfied on the evidence that the respondent, in giving the direction dispersing refusers and other employees, was not seeking to punish them for resorting to the Act. Having considered all of the evidence, we are convinced that the respondent shut down the plant because it failed to persuade the refusers that the plant was safe; and without their production lines operating, the respondent felt that there was nothing else to do. We do not find that the direction was motivated by an intention to eliminate the refusers’ participation in the



Ministry's investigation. The evidence discloses that neither the respondent nor officials of Local 127 were thinking about the Ministry's investigation at 9:30 a.m.. Neither Mr. Warner (who had official responsibility for safety matters insofar as Local 127 was concerned) nor Mr. Arnold (who went to great lengths in his testimony to prove to us he was very conversant with the Act) nor anyone else in Local 127's officialdom raised the fact that if the refusers were sent home, none of them would be present at the investigation. Mr. Warner and Mr. Tindale knew that the inspectors were being called during the meeting in Mr. Vanest's office and they also knew that the respondent intended sending all of the refusers home, without pay, if they could not be persuaded to return to work. Neither thought to advise the refusers of their right to be at the Ministry investigation. Mr. Warner did not object or take issue with the inspectors' request for three representative employees only. All of this has led us to conclude that all the participants in the event realized that the direction of the respondent was a practical one in the circumstances and not a nefarious scheme to punish the refusers or eliminate them from the Ministry investigation. Even the inspector who has the actual statutory duty to conduct the investigation in the presence of the refusing employees did not request the recall of all 50 refusers.

32. We are satisfied that the respondent sent the refusers home because there was nothing else it could practically do. The refusers were obviously of the belief that the whole plant was unsafe because the safe spot they sought near their work stations was the gatehouse, a distance from and outside the plant building. It is clear Mr. Tindale at least did not think that the refusers' regular pay should continue despite the direction, because he initiated inquiries about the short work week benefits. This is not surprising because, normally, the regular hourly pay of an employee ceases when he/she is sent home. Undoubtedly, Mr. Tindale and Mr. Warner were more concerned about discipline which might be imposed on the refusers – this was indeed the gist of their complaint before us. We have found it unnecessary to decide whether, if the refusers had been present for the investigation, they would be entitled to their regular pay. We have determined the direction not to have been made *because* the refusers were complying with the Act and, therefore, it is unnecessary to decide whether the direction removed an opportunity for payment that would have been otherwise present during the investigation itself. The facts of this case also do not require us to render a determination of whether refusing employees are entitled to pay throughout the procedures of section 23 and whether failure to pay them is in and of itself a violation of section 24 or whether these moneys must be recovered through other legal processes (for example, the *Employment Standards Act*, R.S.O. 1980 c.137; see *Ingersoll Machine and Tool Company Limited* unreported decision of referee M.G. Picher, appointed under section 51 of the *Employment Standards Act*, dated August 9, 1982 No. 1263)

33. We have concluded that section 24(1)(c) was not breached by the respondent directing the refusers home on December 10th and stopping their regular pay. The respondent has satisfied us that it was a "no work" situation and the directive was merely to avoid paying in circumstances where no work was being performed. There was nothing in the evidence from which to infer or conclude that the direction was intended to penalize the refusers. We are unable to find that Mr. Arnold has any greater claim to payment for the period claimed by the other complainants because he was, by 9:30 a.m., part of the group of refusers, and the direction given to him was the same as given to them in all respects. We cannot leave this segment of the complaint without

commenting that the complainants never argued that the manner in which the respondent informed them of their payment for time lost on December 15th (Exhibit 4) constituted intimidation or coercion contrary to section 24(1)(d).

34. To remedy the results of this unlawful conduct, in connection with Mr. Arnold, we order that:

- (i) the respondent's Manager of Human Relations and Manager of Manufacturing Operations jointly post the attached Notice on all bulletin boards at the Chatham plant;
- (ii) a copy of the Notice be circulated to all managers at the Chatham plant, including first-line supervisors.

35. For the reasons stated in paragraph 17 we hereby dismiss the complaints by Messrs. Warner and Tindale.

#### **DECISION OF BOARD MEMBER S. COOKE;**

I concur with this decision, but comment that I do not agree with the narrow interpretation of section 24 as outlined in paragraph 24 of this decision. Section 24 of the *Occupational Health and Safety Act* makes section 89 of the *Labour Relations Act* a part of this Act and thereby makes other remedies available than prosecution under section 37.

#### **DECISION OF BOARD MEMBER, LLOYD HEMSWORTH;**

1. My reading of the evidence in this case differs from that of my colleagues in two major respects.

2. Firstly, I find it necessary to weigh the evidence to determine whether there were reasonable grounds for the belief that a safety hazard actually existed. Concisely stated, I am not satisfied to ignore, as my colleagues seem to have done, the results of the tests conducted by the professional consulting engineers - technical tests which were conducted before and throughout the period of this incident.

3. Secondly, my evaluation of the evidence of the witnesses necessitates, for reasons listed below, questioning the credibility of the complainant Richard Arnold.

4. My colleagues appear to have accepted as valid the "report" of the Ministry safety inspectors. This "report" is based solely on the uncalibratable readings of the inspectors' corporal olfactory equipment.

5. This so-called "sniff test" resulted in an official order to the respondent to re-flush the drains. This order has been taken to imply that a serious explosive hazard existed and that, therefore, the complainant, Arnold, had grounds for leaving his work place and initiating the costly shutdown of the plant that ensued.

6. I am unable to give any weight to the "sniff test", in the light of the results of the tests conducted by the professional engineers and conveyed, according to the

evidence, to the complainant Richard Arnold, to the union officers, and to the bi-partite safety committee, repeatedly, before and during the incident and as early as 0730-0800 hours on the morning of the day of the work disruption, 10th December, 1980.

7. The technical equipment employed by the consulting engineers recorded readings of 1,100 ppm, whereas the minimum reading for an explosive mixture would be, we are advised, in the order of 14,000 ppm.

8. This objective evidence was not recorded by my colleagues in their decision for a reason not clear to me.

9. Needless to say, the professional integrity of this consulting engineering firm ensures that the report of their test results would be the same regardless of who employed them or who paid their fee.

10. I am persuaded on the basis of the evidence that there was no reason to believe that a hazard existed on 10th December and, further, that the complainant had been repeatedly so advised by his supervisors and other responsible management officials.

11. *The Occupational Health and Safety Act* confers a frightening capability on an individual or group to do damage to our industrial enterprises – the source of our economic wealth and wellbeing.

12. Clearly the Legislature recognized the possibility that some mis-directed people or even well-intentioned people swept up, for example, by the adversary concept of our current collective bargaining system, might be able to use the Act for their own purposes.

13. Because of the danger of such untoward incidents, our Legislature believed it necessary to write a safeguard into the Act. A safeguard designed to discourage abuse or to allow the Act to be used, as one person described it, to “legalize a one-man strike”.

14. This safeguard appears in the Act in two subsections. Initially, in section 23(3), a worker may refuse to work only when, the Act states, “he has *reason* to believe” that the work place is unsafe. (Emphasis mine) Later in section 23(6), the Act is more explicit. To continue to refuse to work, the worker must have “*reasonable grounds* to believe...” (emphasis mine). It is not sufficient that he *believes* the work place is unsafe. He must have *reason to believe* that it is unsafe.

15. Here, then, is an essential ingredient to the application of the Act. Did the complainant have reason to believe or reasonable grounds to believe that the work place was unsafe?

16. The answer, in my opinion, is “no”. The only valid evidence of whether there was, or in this case was not, a hazard lies in the technical tests – available to the complainant and all others interested before and throughout this incident.

17. The requirement imposed by the safety inspectors that the drains be re-flushed cannot be taken as a repudiation of the professional engineers’ tests. The inspectors unfortunately were not equipped to determine whether or not the fumes were present in enough of a concentration to constitute a hazard. It may be that they saw their order as a



mediation attempt to chart a middle course in the hope that it would solve the affair and get the employees back to work and the plant back into operation. Whatever their reasons, I find they were not equipped to ignore or counter the test results of the consulting engineers.

18. Their "order", if it was a determination that a hazard existed (as it has been interpreted as being) it was nothing less, in my opinion, than a bureaucratic blunder and an abuse of bureaucratic authority.

19. Parenthetically, this is the sort of unnecessary industrial expense we can ill afford if our enterprises are to fulfil their wealth and employment-generating roles, particularly in these difficult times.

20. In making this finding I am not unaware that I am pursuing a moot point not mentioned by the respondent's counsel in his argument. This does not deter me. I am, to the best of my ability, reading the evidence and recording the facts I consider relative to the interpretation and application of the *Occupational Health and Safety Act* to this situation.

21. Significant, as I see it, is the fact that the respondent's counsel, bearing the burden of proof, rested his case early when the complainant's counsel abstained from any detailed cross-examination of the chief witnesses. A bit of an hiatus arose over the question of the right of complainant's counsel to introduce contrary evidence without prior indication. This resulted in the respondent's counsel subsequently recalling his chief witnesses to confirm and reinforce their earlier testimony.

22. In any event, it seemed clear to me, then as well as later, that respondent's counsel saw no grounds for the complaint. By way of example, the early evidence revealed the respondent's quick action in closing the plant the previous day when there was clear evidence of a fume hazard. There seems no logic in assuming that the respondent would act differently on the following day, if indeed there had been any reason to believe a hazard still existed.

23. I turn now to the credibility of the complainant, Richard Arnold. Most of the relevant statements in Mr. Arnold's testimony were contrary to statements of the respondent's witnesses and some he himself denied in cross-examination.

24. For example:

- (1) It only came out in cross-examination that he had been advised as early as 0700 hours that readings indicated the plant was safe. Subsequent evidence reveals that he was told first by his foremen and shortly thereafter by the safety committee carrying out an inspection.
- (2) His only response when he was told repeatedly that the test revealed that the plant was safe was: "I'm out here under Bill 70 and not going back until proper authority arrives."
- (3) He tried to reflect a threatening attitude and one of intimidation by Coutts and Locke. In the absence of any verbal threats by these

people, he injected colourful words into his testimony e.g., “furious, red in face, did not seem too cool”, etc. The evidence of the principals and other witnesses contradict these allegations.

In addition, a memorandum written by Arnold shortly after the incident does not record these colourful words. It appears from his testimony they may have been inserted in a later draft which was not available to the Board.

- (4) When he stated in the guardhouse that he wished to discuss the matter with one of his committeemen, he was invited to go to the Personnel Department for this purpose. In his evidence he stated that the invitation to go to the Personnel Department was a threat. As it turned out he stopped before entering the office and returned to the yard and no disciplinary action was taken against him nor were any threats issued. At one point he said that the reason he wanted to see his committeeman was because he thought he was about to be fired. When he was asked why, he replied that the visit was not for “tea and crumpets”. He went on to say people had been fired for similar acts of “insubordination”. In cross-examination he stated, under pressure, that there were no threats made when he was asked to go to the office; there was no talk of any discipline. In answer to these questions, he kept referring to the “red face” and “furious” attitudes. When he was asked if anyone had been fired in similar situations in the last ten years he said “yes”. This evidence was subsequently denied. According to the records no one had been fired in this kind of situation.

25. My notes reflect other inconsistencies in Arnold’s testimony and I am left with the general impression, growing out of his and other testimony, that here we have an employee imbued with the power of his rights under this relatively new legislation who is most desirous of testing these rights at the first opportunity.

26. I would dismiss the complaint on the grounds that there was no reasonable grounds to believe that a hazard existed.

27. I would be remiss if I failed to comment on the remedy proposed by my colleagues. In principle I cannot condone the Ontario Labour Relations Board ordering one of the parties in a collective-bargaining relationship to demean itself by a public declaration of unlawful conduct under an Act such as the *Labour Relations Act*.

28. The *Labour Relations Act* in the words of its frequently-misconstrued Preamble is designed “to further harmonious relations between employers and employees....”

29. Forcing one of the parties to sign and post in the place of employment a confession of this type can hardly be viewed as contributing to harmonious relationships.

30. If, however, such posting should become a Board policy, then in view of my finding in this case, I would order, as remedy, that Mr. Richard Arnold have the following Notice posted on all bulletin boards at the Chatham plant:

NOTICE

I have posted this Notice in compliance with an Order of the Ontario Labour Relations Board after a hearing in which I and the union and the Company participated. The Ontario Labour Relations Board found that I did not have the right to walk off the job and leave my work place without permission on 10 December, 1980, when I did not have reasonable grounds to believe that my work place was unsafe.

In the future I will exercise my rights under the Occupational Health and Safety Act in accordance with the provisions of that Act.

Signed: Richard Arnold

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## Appendix

# NOTICE TO EMPLOYEES

## Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND YOUR UNION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE OCCUPATIONAL HEALTH AND SAFETY ACT BY DIRECTING RICHARD ARNOLD TO RETURN TO HIS WORK ON DECEMBER 10, 1980, WHEN HE WAS EXERCISING HIS RIGHT TO REFUSE TO WORK UNDER SECTION 24(1) OF THE OCCUPATIONAL HEALTH AND SAFETY ACT.

THE OCCUPATIONAL HEALTH AND SAFETY ACT PROVIDES:

23.-(3) A WORKER MAY REFUSE TO WORK OR DO PARTICULAR WORK WHERE HE HAS REASON TO BELIEVE THAT,

- (A) ANY EQUIPMENT, MACHINE, DEVICE OR THING HE IS TO USE OR OPERATE IS LIKELY TO ENDANGER HIMSELF OR ANOTHER WORKER,
- (B) THE PHYSICAL CONDITION OF THE WORK PLACE OR THE PART THEREOF IN WHICH HE WORKS OR IS TO WORK IS LIKELY TO ENDANGER HIMSELF, OR
- (C) ANY EQUIPMENT, MACHINE, DEVICE OR THING HE IS TO USE OR OPERATE OR THE PHYSICAL CONDITION OF THE WORK PLACE OR THE PART THEREOF IN WHICH HE WORKS OR IS TO WORK IS IN CONTRAVENTION OF THIS ACT OR THE REGULATIONS AND SUCH CONTRAVENTION IS LIKELY TO ENDANGER HIMSELF OR ANOTHER WORKER.

WE WILL NOT DO ANYTHING WHICH INTERFERES WITH YOUR RIGHT UNDER THIS SECTION.

INTERNATIONAL HARVESTER COMPANY OF  
CANADA LIMITED

PER: \_\_\_\_\_

**This is an official notice of the Board and must not be removed or defaced.**

DATED this 24TH day of JUNE, 1985.



**1614-81-R** International Brotherhood of Painters and Allied Trades - Local Union 1891, Applicant, v. **Johnsons Painting Co. Ltd.**, Respondent

**Certification - Practice and Procedure - Reconsideration - Union in error naming Johnson's Painting Co. instead of Johnson's Painting Co. Ltd. as respondent - Board notices sent to wrongly named company but at correct address - Board finding notice received by employer - Employer not entitled to ignore notice because of error - Board not revoking but amending certificates - Not permitting employer to re-open case to raise issues as to membership evidence defects**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members, W. Gibson and C. A. Ballentine.

**APPEARANCES:** *M. Zigler and A. Colafranceschi for the applicant; Willem Poolman for Johnson's Painting Co. and Johnsons Painting Co. Ltd.; Irv Kleiner for 526132 Ontario Incorporated carrying on business as Kos Decorating.*

**DECISION OF THE BOARD;** June 14, 1983

1. This matter involves a request that the Board reconsider its decision of November 6, 1981 wherein it certified the applicant trade union ("the union") for a unit of painters and painters' apprentices in the employ of "Johnson's Painting Co."

2. At the commencement of the hearing held into the request for reconsideration counsel appeared on behalf of 526132 Ontario Incorporated carrying on business as Kos Decorating ("Kos"). Counsel requested that Kos be added as a party to the proceedings in that in another file (File No. 1880-82-M filed January 6, 1983) the union had requested pursuant to section 1(4) of the *Labour Relations Act* that the Board declare that Kos, Johnson's Painting Co. and Johnsons Painting Co. Ltd., constitute a single employer under the Act or, in the alternative, that there had been a sale of a business within the meaning of section 63 of the Act from Johnson's Painting Co. to Johnsons Painting Co. Ltd. and then a second sale from this company to Kos.

3. It is common ground that Kos was incorporated on October 12, 1982. The reconsideration request relates to the propriety of the Board's action in certifying the union on November 6, 1981. In that Kos did not come into existence until some eleven months after the union's certification, the Board orally ruled at the hearing that Kos did not have status to intervene in these proceedings.

4. The evidence before the Board indicates that in September of 1975 Mr. John Sourasis commenced carrying on business in the Toronto area under the name of Johnson's Painting Co. On January 26, 1981 Mr. Sourasis renewed his registration with the Ministry of Consumer and Commercial Relations as a sole proprietor carrying on business under that name. In September of 1981 Mr. Sourasis decided, for financial and other reasons, to henceforth carry on business through an incorporated firm. Accordingly, on September 23, 1981 Johnson's Painting Co. Ltd. was incorporated, with Mr. Sourasis as the sole incorporator. Mr. Sourasis acquired sixty per cent ownership of the limited company, and his wife forty per cent. Mr. Sourasis also became the president and sole director of the limited company. On the same day that the limited company was



incorporated, Mr. Sourasis sold the business of Johnson's Painting Co. "as a going concern" to Johnsons Painting Co. Ltd. Although the articles of incorporation of the limited company were dated September 23, 1981, they were not received by the Ministry of Consumer and Commercial Relations until November 17, 1981. Further, a withdrawal of the registration of Johnson's Painting Co. was not filed with the Ministry until September 15, 1982. Subsequent to September 23, 1981, Mr. Sourasis did not carry on any business as Johnson's Painting Co. Instead all business was carried on through the limited company. The limited company continued to operate in the same manner as had Johnson's Painting Co. with Mr. Sourasis making all of the operating decisions. Work on a contract which had been entered into in the name of Johnson's Painting Co. was continued by the limited company without any new contract being entered into or any formal amendment to the original contract.

5. During the month of October, 1981 the union commenced a campaign to organize persons it understood to be employees of "Johnson's Painting". On one occasion Mr. L. Anderson, a business agent of the union, met Mr. Sourasis on a job site. During an ensuing discussion, Mr. Sourasis gave Mr. Anderson his business card, which was headed up "Johnson's Painting Co. Painting & Decorating". On October 26, 1981 Mr. Anderson set about to establish the proper name of "Johnson's Painting". To this end he attended at the offices of the Ministry of Consumer and Commercial Relations where he ascertained that there was on file a registration for "Johnson's Painting Co.". Mr. Anderson requested information about a possible incorporated company with a similar name, but was advised that the only incorporated firm on file with such a name was located in Thunder Bay. As already noted, prior to October 26, 1981, Mr. Sourasis had incorporated Johnsons Painting Co. Ltd. and sold to it the business he had previously carried on as Johnson's Painting Co. However, because no record of these transactions had as yet been filed with the Ministry of Consumer and Commercial Relations, Mr. Anderson reasonably concluded that Johnson's Painting Co. was the proper name of the business the union was seeking to organize.

6. The union's application for certification was filed with the Board on October 26, 1981. The application was signed by Mr. Armando Colafranceschi, the union's business representative. Acting on information from Mr. Anderson, Mr. Colafranceschi named Johnson's Painting Co. as the respondent to the application.

7. On October 27, 1981 the Board forwarded by registered mail a notice of the application for certification (Form 77) as well as a copy of the application and certain other documents to:

Johnson's Painting Co.  
713 Greenwood Avenue  
Toronto, Ontario  
M4J 4B6

At the hearing, Mr. Sourasis testified that he resided at this address and that from this address both Johnson's Painting Co. and Johnsons Painting Co. Ltd. had carried on business. The material sent to the Greenwood Avenue address was not returned to the Board by the Post Office. On the application for certification the union indicated that the phone number of the respondent was "466-4494 (John Sourasis)". An entry on the Board file indicates that on October 29, 1981 a Board clerk telephoned this number and left a message that she be called by Mr. Sourasis, but that the call was not returned.

8. Included with the material sent to 713 Greenwood Avenue was a Form 81 on which a reply could be filed. The first paragraph of the form has a space for a respondent to note the "correct name of respondent". Paragraph 6 asked for the "total number of employees of the respondent on the job or jobs in respect of which the application for certification has been made". Paragraph 13 asked the respondent for "other relevant statements" it might wish to make.

9. The Form 77 sent to 713 Greenwood Avenue stated that November 4, 1981 had been set as the terminal date for the application and indicated that any reply should be filed by that date. The form also indicated that the respondent should forward to the Board a list of employees in the applied for bargaining unit on the application date. A note at the end of the reply form contained the following statement:

"If you fail to file a reply within the time fixed by paragraph 5 of Form 77, Notice of Application for Certification, Construction Industry, or if your reply is incomplete the Board may proceed to dispose of the application on the evidence and representations before it without further notice to you and without a hearing."

10. Part of the material sent to the Greenwood Avenue address by the Board was a Form 78, "Notice to Employees of Application for Certification, Construction Industry". A covering letter from the Registrar directed that the Form 78 be posted so as to bring the application to the attention of employees, and that when this had been done the respondent was to so notify the Board by way of a Form 74 (Return of Posting Card). No return of posting card was received by the Board. That, along with the lack of any meaningful telephone contact which might have verified a posting, prompted the Board to mail a copy of the Form 78 to each of the persons on whose behalf the union had filed membership evidence.

11. No reply or other material from the respondent was received by the Board by the terminal date set for the application. Section 102(14) of the Act provides that the Board need not hold a hearing into a construction industry certification application. In that no issues had been raised by the respondent, the Board proceeded to consider the application on the basis of the material filed by the union. This material included membership evidence on behalf of six persons as well as a declaration indicating that these six persons were the only employees in the applied for bargaining unit on the date of the filing of the application. In a decision dated November 6, 1981 the Board directed that in accordance with the provisions of section 144(2) of the Act, two certificates should issue to the union.

12. On November 10, 1981 the Board forwarded by regular mail a copy of its decision of November 6, 1981, as well as a copy of the two certificates to:

Johnson's Painting Co.  
713 Greenwood Avenue  
Toronto, Ontario  
M4J 4B6

This material was not returned to the Board by the Post Office.

13. At the hearing into the request for reconsideration, Mr. Sourasis testified that he had not received any material from the Board relating to the application for certification. He stated that he did not recall whether or not he had received copies of the Board certificates.

14. On February 19, 1981, prior to the issuance of the certificate in this matter, the Board certified the Metropolitan Toronto Residential Painting Contractors Association as the bargaining agent of all employers of painters and painters' apprentices represented by the trade union in the residential sector, in a geographic area which included Metropolitan Toronto. Pursuant to the provisions of what are now sections 128 and 129 of the Act, any employer for whom the union subsequently acquired bargaining rights in Metropolitan Toronto, would, in the residential sector, automatically be bargained for by the Metropolitan Toronto Residential Painting Contractors Association and be bound to any collective agreement entered into between the Association and the union.

15. In January of 1982 representatives of the union met with representatives of a number of residential painting contractors to discuss the union's plans and to review the obligations of those contractors whose employees were represented by the union. A number of contractors whose employees were not represented by the union were in attendance at the meeting. We surmise that their attendance reflected the union's on-going attempt to organize employees in the residential painting field. Mr. Sourasis was in attendance at this meeting. Subsequent to this first meeting a collective agreement was entered into between the union and the Metropolitan Toronto Residential Painting Contractors Association. As already indicated, by law this agreement was automatically binding on any employer for whose employees the union held bargaining rights. In August of 1982 the union held a second meeting with contractors to discuss the collective agreement. Mr. Sourasis attended at this meeting. Mr. Sourasis testified that during this meeting he was told that he had been certified and was bound to the collective agreement. Mr. Sourasis spoke at the meeting to indicate that he would have trouble living up to the terms of the collective agreement on certain work he was then performing, and that he would require "a break" to finish it.

16. According to Mr. Sourasis, representatives of the union repeatedly came onto one of his job sites to tell him that he had been certified. He stated that he was not certain when these visits had started, but felt it could have been in January of 1982. Mr. Sourasis testified that he finally got "sick and tired" of being told he had been certified and accordingly "took everything" to his lawyer, and that his lawyer sent a letter to the union. Mr. Sourasis's comment about a letter appears to have been a reference to a letter sent by his lawyer to the Registrar of the Board dated February 19, 1982. The letter read as follows:

"This is to advise you that our client Johnson's Painting Co. Ltd. was incorporated on the 23rd of September, 1981, and that the business of Johnson's Painting Co. was transferred to that Company. The business carried on as Johnson's Painting Co. was dissolved. Therefore, the proceedings which were apparently commenced before your Board as per your notice of the 27th of October, 1981, were invalid.



As our client only took notice of these documents recently, we regret that no notice was given to the Board before.”

The Registrar took no action in response to the letter.

17. There was also filed with the Board a copy of a letter sent by counsel for Johnson's Painting Co. Ltd. to the Bulger Group of Companies. We believe we can take notice of the fact that the Bulger Group is involved in the administration of a number of trust funds established under construction industry collective agreements. The letter indicates that it was in reply to an earlier letter addressed to Johnson Painting Co. from the Bulger Group. The earlier letter was not placed in evidence, but from the contents of the reply and the role of the Bulger Group, we surmise that the initial letter likely dealt with the lack of any payments by Johnson's Painting to various trust funds established under the collective agreement between the union and the Metropolitan Toronto Residential Painting Contractors Association. The letter sent to the Bulger Group, dated September 16, 1982, read as follows:

“We act for Johnson's Painting Co. Limited, and were handed your letter of August 31st, 1982, addressed to Johnson Painting Co. Please be advised that Johnson's Painting Co. was dissolved on the 23rd of September, 1981, and is no longer in business.

Our client does not have any employees and works only through sub-contracts and the sub-contractors are responsible for Workmen's Compensation, Pension Plan, etc. Therefore, there does not need to be any necessity for our client to be involved.”

18. On December 13, 1982 the union filed a grievance against Johnson's Painting Co. alleging that it had violated the collective agreement between the union and the Contractors' Association. On January 6, 1983 the union referred the grievance to the Board under section 124 of the Act. On January 19, 1983 the union made the earlier referred to request under section 1(4) of the Act that Johnson's Painting Co., Johnson's Painting Co. Ltd. and Kos be treated as a single employer, or in the alternative, that the Board find that there had been a sale of a business under section 63 of the Act from Johnson's Painting Co. to Johnsons Painting Co. Ltd. and then to Kos.

19. This request for reconsideration of the certification of Johnson's Painting Co. was filed on February 22, 1983. The request was clearly prompted by the section 124 referral. The request for reconsideration raised a number of issues, which were summarized in the request as follows:

“1. The wrong party was named as the Respondent in the Applications for Certification and in fact the wrong party was actually certified by the Ontario Labour Relations Board.

2. The Board was misled by the evidence filed in connection with the Certification Applications as to the complete facts surrounding the Union membership of the individuals in question and the membership

evidence was defective and irregular, having been obtained by misrepresentation.

3. Johnson's did not at any material time have any employees other than employees excluded under the certificates, such as John Sourasis. No income tax deductions were made, no statutory benefits or remittances such as Canada Pension Plan contributions, unemployment insurance remittances, holiday pay, vacation pay, overtime pay were paid to or on behalf of any contractor of Johnson's. No payroll records have been kept nor are any such required to be kept under any law, respecting such contractors.

4. Johnson's was essentially acting as a job broker. It would bid on projects and in turn obtain bids from other contractors; to the successful sub-bidder would be awarded a contract at a fixed sum.

5. The Board was materially misled as to number of individuals in any bargaining unit at the time the Applications were brought in that a majority of the individuals were not represented by the Union. Some contractors of Johnson's had further employees on other projects who may be affected by the certificates.

6. If our position regarding Johnson's position as having no employees is held to be unfounded, the failure to have notices posted denied the opportunity to other eligible individuals contracting with Johnson's to be in the bargaining unit and be represented by the Union and of the right to oppose or support the Certification Applications.

7. There has been a denial of natural justice in that the Board failed to notify Johnson's that Applications for Certification were pending and that it was entitled to reply to the Applications.

8. There has been a denial of natural justice in that the Board failed to respond to our letter of February 19, 1982 in which we specifically stated that our client had received no notice of any applications for certification, and in that the Board did not attempt to remedy this situation after receiving this information.

9. The Union has failed to inform those who have contracted with Johnson's as well as Johnson's itself that there must be deductions and remittances for Union dues payment of which is sought from Johnson's only, in the subject grievance.

10. The Contractors Association has never considered Johnson's to be a member of its Association and Johnson's has never considered itself to be a member of the Association nor has it submitted dues or fees to support the Association."

20. In reply to the request for reconsideration, counsel for the union wrote to the Board on March 15, 1983. In this letter the union contended that if it had made a mistake

in naming the respondent in the certification proceedings, the mistake “should be corrected by the Board, pursuant to sections 106(1) and 104 of the Act and, accordingly, the certificates issued by the Board should be varied”.

21. Sections 106(1) and 104 of the Act provide as follows:

“106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.”

“104. Where in any proceedings before the Board the Board is satisfied that a *bona fide* mistake has been made with the result that the proper person or trade union has not been named as a party or has been incorrectly named, the Board may order the proper person or trade union to be substituted or added as a party to the proceedings or to be correctly named upon such terms as appear to the Board to be just.”

22. We turn first to deal with the allegation that the wrong party was named as the respondent in the application for certification. On the basis of the facts set out above, we are satisfied that the intent of the union was to apply to be certified with respect to the employer of the individuals it had signed into membership. The union took all reasonable steps to ascertain the proper name of the employer and reasonably concluded on the basis of the filings with the Ministry of Consumer and Commercial Relations that it was Johnson's Painting Co. In consequence of this conclusion the union made a *bona fide* mistake in naming the respondent. Had this error been raised during the certification proceedings, we would have exercised our discretion under section 104 of the Act to amend the name of the respondent to Johnsons Painting Co. Ltd. In our view, it would be appropriate to now correct the name of the respondent. Accordingly, the name of the respondent in these proceedings is hereby amended to read “Johnsons Painting Co. Ltd.”

23. The respondent contends that at the relevant time it had no employees or, in the alternative, if it did have employees “the failure to have notices posted denied the opportunity to other eligible individuals contracting with Johnson's to be in the bargaining unit and be represented by the union and of the right to oppose or support the certification applications”. As noted above, the Board mailed copies of the Form 78, “Notice of Application for Certification, Construction Industry” to each of the persons on whose behalf the applicant had filed membership evidence. If there were any employees in the bargaining unit on the application date who did not receive notice of the certification application, and should any such employees subsequently communicate with the Board, the Board will certainly entertain their submissions and, if appropriate, exercise its reconsideration powers. However, on the basis of the material now before us, it appears that appropriate notice was in fact given to employees affected by the application.



24. We turn now to consider the respondent's claim that it did not receive notice of the certification application. If in fact the respondent did not receive notice of the application, the only appropriate course would be to re-open the certification proceedings and reconsider the application *de novo*, giving full opportunity to the respondent to raise any objections it might have to the application.

25. The *Labour Relations Act* deals with the sending of notices as follows:

"113.-(1) For the purposes of this Act and of any proceedings taken under it, any notice or communication sent through Her Majesty's mails shall be presumed, unless the contrary is proved, to have been received by the addressee in the ordinary course of mail."

On the basis of this provision, the Board is entitled to presume that the notice of the application for certification, as well as the other material forwarded to the Greenwood Avenue address by the Board, was received at that address in the ordinary course of mail. This presumption can, however, be rebutted by proof that the notice was not received.

26. We believe we can take notice of the fact that most of the mail the Board sends out is received by the addressee. Further, when for some reason the Post Office cannot make a delivery of registered mail, it generally returns the material to the Board. This system is not, however, infallible, and from time to time mail is not delivered or is not delivered in a timely fashion. Our experience is that if for some reason notice of a proceeding is not received by a party, the first time that party is made aware of the proceedings, it immediately advises the Board that it did not receive the notice and requests that the proceedings begin anew.

27. The evidence of Mr. Sourasis with respect to his claim that he did not receive notice of the certification application is worth reviewing. Mr. Sourasis testified he did not receive notice of the application. He also stated that he was not sure if he had received copies of the certificates sent to the respondent by the Board. It appears highly unlikely that both the notice of the application and the copies of the certificates would have become waylaid in the mail, especially since both were properly addressed to Mr. Sourasis' home address. If Mr. Sourasis had not in fact received the original notice of application, then logic suggests he would have been quite surprised to receive a copy of two certificates accompanied by a Board decision recounting the fact that the respondent had failed to file a reply to the application. Indeed, had this occurred, one would have thought that his first reaction would have been to contact the Board. Mr. Sourasis, however, did not immediately contact the Board. On February 19, 1982 counsel for the respondent did write to the Board to advise it that the business of Johnson's Painting Co. had been transferred to Johnsons Painting Co. Ltd. The letter, however, did not state that the Board's notice of October 27, 1981 had not been received. Indeed, to the contrary the wording of the letter, which is repeated below, indicates that it was received, but simply not taken notice of:

"Therefore, the proceedings which were apparently commenced before your Board *as per your notice of the 27th of October, 1981* were invalid.

*As our client only took notice of these documents recently, we regret that no notice was given to the Board before."*

(emphasis added)

According to Mr. Sourasis, as early as January, 1982 representatives of the union advised him that he had been certified. At the meeting in August, 1982 Mr. Sourasis was advised that his firm had been certified and was bound to the collective agreement between the union and the Contractors' Association. During these various exchanges Mr. Sourasis did not make any comment about his not having received notice of the application. Indeed, the very first time that the possible non-receipt of the notice was raised was in 1983, after the union had grieved that the respondent had violated the collective agreement. These various considerations, and in particular the late raising of the "non-receipt" issue, and the reference to the notice in counsel's letter of February 19, 1982, lead us to conclude that notwithstanding his testimony to the contrary, Mr. Sourasis likely did receive notice of the union's application for certification.

28. The application for certification was filed in the name of "Johnson's Painting Co." whereas the business involved had already been transferred to "Johnsons Painting Co. Ltd." This raises the question as to whether or not Mr. Sourasis was free to ignore the application. We believe not. It is clear that the "business" involved was the same before and after the transfer to the limited company. Further, the very first paragraph on the reply form asked for the "correct name of the respondent". It should have been clear to Mr. Sourasis that the union was seeking to be certified with respect to his current operations and, hence, that he should advise the Board of the firm's correct name by way of the reply form. In these circumstances, we are of the view that it was not open to Mr. Sourasis to ignore the application for certification simply because it had not been filed in the name of the limited company.

29. At the hearing, counsel for the respondent contended that if the limited company were now to be named as the respondent, natural justice required that it be allowed to raise certain issues before the Board. These issues primarily relate to the manner in which it is alleged the union acquired its membership evidence, and to the claim that on the application date the respondent had no employees, but rather utilized the services of a number of "sub-contractors". In giving his testimony, Mr. Sourasis referred to the individuals involved as both "sub-contractors" and "piece workers". Had the status of these individuals been raised in a reply to the application for certification, the Board would have conducted an inquiry into the issue of whether they were independent contractors or employees paid on a piece rate basis. The Board would also have inquired into any disagreement relating to the number of individuals affected by the application. In addition, the Board would have provided the respondent with an opportunity to lead evidence in support of its allegations relating to the manner in which the union acquired its membership evidence. In our view, however, it is now too late for the respondent to seek to raise any of those issues. As we have indicated above, given the material sent to his home, it should have been reasonably clear to Mr. Sourasis that the certification application related to the business under his control. At the time he had an opportunity to file a reply showing the proper name of the respondent and raising any issues relevant to the application. He did not do so, and in our view the respondent is bound by his action in this regard.

30. In its letter of February 22, 1983 the respondent raised certain issues related to the alleged lack of information from the union and the position of the Contractors' Association subsequent to the union's certification. These matters may be of relevance to the grievance filed by the union. However, in our view they do not relate to the certification proceedings themselves.

31. In his letter of February 22, 1983, counsel for the respondent contended that there had been a denial of natural justice "in that the Board failed to respond to our letter of February 19, 1982 in which we specifically stated that our client had received no notice of any applications for certification, and in that the Board did not attempt to remedy this situation after receiving this information". The letter to the Board of February 19, 1982 stated that the business of Johnson's Painting Co. had been transferred to the limited company. It did not, however, state that the respondent had failed to receive notice of the application. Indeed, the letter suggests that the respondent received the notice but failed to take notice of it in a timely fashion. In addition, the letter did not ask the Board to take any action, and in particular, did not ask the Board to reconsider its decision to certify the union. In all the circumstances, we do not believe that there was any denial of natural justice.

32. The construction industry provisions of the *Labour Relations Act* and the regulations under the Act clearly indicate a Legislative intent that construction industry certification applications be processed quickly. This, together with the need for finality in Board proceedings, strongly mitigates against granting requests to re-open a certification proceeding unless there are compelling grounds to do so. In our view, such grounds are not present in this case.

33. Having regard to all of the above, the request for reconsideration is hereby dismissed. Amended certificates will issue to the applicant showing the proper name of the respondent as "Johnsons Painting Co. Ltd.".

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**2653-82-U Employees of Manor Cleaners Ltd., Complainant, v. Textile Processors, Service Trade, Health Care, Professional and Technical Employees International Union, Local 351, Respondent**

**Duty of Fair Representation - Ratification and Strike Vote -Unfair Labour Practice - Union not meeting with employees prior to or during bargaining process - Preventing non-members from voting at strike vote - Board finding breach of fair representation and strike vote provisions in Act - Directing union to report to employees on state of negotiations as part of remedy**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members, J. A. Ronson and P. J. O'Keeffe.

**APPEARANCES:** *Mike Quinn, Dorothy Franko, Laxmi Badiani and Mary Jane McCallum for the complainants; Richard McNaughton for the respondent.*

**DECISION OF THE BOARD; May 31, 1983**

1. This is a complaint under section 89 of the *Labour Relations Act*. The grievors allege that they have been dealt with by the respondent contrary to the provisions of sections 70 and 72(5) of the Act. The complaint was drafted by rank and file employees and on the hearing of the case it became apparent that the substance of the complaint was an alleged violation of section 68 of the Act as well as section 72(5).

2. The facts are not in dispute. By a decision of the Board dated December 8, 1982 the respondent trade union was certified as bargaining agent for all full time employees of the respondent in its cleaning establishments in St. Catharines. The bargaining unit comprises some 30 employees. The complainants maintain that the trade union has failed in its obligation to represent them in good faith. They submit that it has wrongfully failed or refused to meet and consult with them in the preparation of the union's bargaining objectives and strategy.

3. The union was certified on December 8, 1982 pursuant to section 8 of the Act. The Board's order included the right to conduct two meetings with the employees on the employer's premises. The evidence establishes that the union availed itself of the opportunity to have one meeting with the employees at work. At that time union representative Fernando DiSalvo introduced himself to the employees and indicated to them that there would be a further meeting.

4. The next notification which the employees received from the union was a written notice in February of 1983 advising them that a union meeting was to take place at 6:30 a.m. at the Holiday Inn in St. Catharines on Friday March 4, 1983. The notice to employees is as follows:

*REGISTERED MAIL*

February, 1983.

*TO ALL EMPLOYEES OF MANOR CLEANERS LIMITED*

Please be advised that there will be a Union Meeting:

Date: Friday March 4th, 1983.

Time: 6:30 A.M.

Place: Holiday Inn, St. Catherines.

PLEASE MAKE EVERY EFFORT TO ATTEND!!!!

5. The uncontradicted evidence is that some 22 employees attended at the hotel on the morning of the meeting. When they attempted to enter the room they were advised by union representative Richard McNaughton that a strike vote was going to take place and that if they wanted to enter and participate they would have to sign union cards and pay union initiation dues for doing so. Through the open door of the meeting room the employees could see a head table which seated three union officers. No employees were in the room.

6. It is plain that the employees, many of whom are mothers of small children, were not pleased that the union called the meeting for that time of the morning. Their unhappiness was aggravated by the statement of the union's representative that they must pay initiation fees and join the union to enter the room and to participate in the taking of a strike vote. All of the employees refused to attend on the terms put to them, and they left.

7. It is plainly contrary to the Act to exclude employees from a strike vote simply on the basis that they are not union members. Section 72(5) of the Act provides as follows:

All employees in a bargaining unit, whether or not such employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

8. The employees have had no other contact from the union save that in the preliminary settlement of a complaint to this Board the union agreed to the election of one employee to the union's bargaining committee. That individual, Mrs. Dorothy Franko, referred to by the union's representative as the "shop steward" has no previous knowledge of collective bargaining. While there have been a number of bargaining sessions at which she was present there has been no attempt by the union to schedule any meetings for the bargaining committee to report to the membership or seek of its views.

9. It is difficult to conceive how the duty of fair representation can be discharged when the bargaining agent in an industrial setting fails entirely to meet with the employees prior to or any time during the bargaining process. While a union may be understandably reluctant to meet with a sector of employees who are not supportive of its efforts, the duty of fair representations is owed to all employees. Moreover, the extensive section 89 remedies ordered in this case, including access orders and meetings with the employees during working time, were specifically aimed at assisting the union to overcome such difficulties. We do not see how a trade union can be said to represent in

good faith employees which it has failed or refused to meet and upon whom it has imposed unlawful conditions in the taking of a strike vote.

10. The Board therefore finds that the respondent has violated sections 68 and 72(5) of the *Labour Relations Act*. The respondent is ordered to forthwith convene a meeting of the employees at a time and place reasonably convenient to the employees for the purpose of reporting to them on the state of negotiations. In the event that an agreement has been reached, the meeting shall be for the purpose of providing copies of the collective agreement to the employees and a full explanation of the terms of the agreement to them as well as to answer questions on any other aspect of the collective bargaining process which they may have. The respondent shall further hold, at reasonable intervals, a minimum of three other meetings of the employees in the bargaining unit, after adequate written notice, within one year of this order, and a minimum of four such meetings annually thereafter as long as its bargaining rights continue. In the future the respondent shall refrain from taking or threatening to take any strike vote or ratification vote other than by a secret ballot available to all employees in the bargaining unit, whether or not they are members of the union.

11. The respondent shall mail to each employee written notice of the time and place of the initial meeting ordered by the Board and shall include in its mailing a notice, duly signed by the appropriate official, in the form of the appendix attached hereto.

#### APPENDIX

We Textile, Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, have issued this order in compliance with an order of the Ontario Labour Relations Board issued after a hearing in which we participated. The Ontario Labour Relations Board has found that we violated the *Labour Relations Act* and has ordered us to inform all employees in the bargaining unit of their rights.

The Act gives individual employees these rights:

To be represented by a trade union and to participate in its lawful activities.

To be represented by a trade union in a way that is not arbitrary, discriminatory or in bad faith, whether or not they are members of that trade union,

To participate by secret ballot in any strike vote or ratification vote taken by a trade union in relation to a collective agreement.

We assure all employees represented by Local 351 of the Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, that,

WE WILL NOT do anything that interferes with these rights;



WE WILL comply with all orders of the Ontario Labour Relations Board.

WE WILL give each employee a copy of the collective agreement.

WE WILL hold a minimum of four meetings of the employees in each year.

*(Authorized Representative)*  
Textile Processors, Service Trades, Health Care,  
Professional and Technical Employees  
International Union, Local 351.

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**1117-82-JD** International Association of Machinists and Aerospace Workers, Complainant, v. **Ontario Hydro** & International Union of Operating Engineers, Respondents, v. Lake Ontario District Council United Brotherhood of Carpenters and Joiners of America, Intervener

**Jurisdictional Dispute - Dispute between Machinists and Operating Engineers over small construction equipment repair work - Delay in filing application sufficient reason not to exercise Board's discretion - Employer assigning work to Machinists at mark-up meeting - Unaware that Engineers performing work for over year - Area practice favouring Engineers - Machinists cannot buy jurisdiction through lower wage rates**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members I. M. Stamp and C. A. Ballentine.

**APPEARANCES:** *George Drennan, John Porter, Gord Johnston and Ches Tulk for the complainant; William O'Neill, T. Mollica and W. Gundry for Ontario Hydro; A. M. Minsky, B. Coutts, H. Ingham and P. Gauthier for the International Union of Operating Engineers; No one appearing for the intervenor.*

**DECISION OF THE BOARD;** June 30, 1983

1. This is a complaint concerning work assignment under section 91 of the *Labour Relations Act*. The complainant, the International Association of Machinists and Aerospace Workers (hereinafter referred to as either the "I.A.M." or "the Machinists") has a construction industry collective agreement with the respondent, Ontario Hydro. In this complaint the I.A.M. requests this Board to assign certain work in dispute to its members rather than members of the respondent, International Union of Operating Engineers (hereinafter referred to as the "I.U.O.E." or the "Operating Engineers"). That respondent is also bound by a collective agreement with Ontario Hydro through the

Ontario Allied Trades Council. The respondent, Operating Engineers, although a respondent in this matter, have asked the Board to affirm the existing assignment of work of the work in dispute to the Operating Engineers. The remaining respondent, Ontario Hydro, has taken a neutral position between these two competing trade unions, and indeed, made no representations in this matter other than to assist the Board, and to indicate that they were prepared to abide by the Board's decision.

2. The present dispute is in many respects an unusual dispute and it is worth noting the origins of the dispute presently before the Board. It arises as a result of a grievance filed by the I.A.M. against Ontario Hydro. That grievance is dated May 21st, 1982 and is in the nature of a policy grievance requesting that certain work be re-assigned from the Operating Engineers to the I.A.M. This grievance was ultimately denied by Ontario Hydro on August 18, 1982. The grievance in turn arose not simply from the collective agreement between the I.A.M. and Ontario Hydro, but is also a consequence of a mark-up meeting which took place on June 24, 1981. At that mark-up meeting, various assignments for the Darlington Nuclear Generating Station were discussed and under the heading of "Construction Shops" the garage workforce was assigned. The suggested assignment from Ontario Hydro was confirmed on September 24, 1981 and reads as follows:

"Garage

In the gargage, a staff of Auto-Diesel and Heavy Duty Mechanics will be employed on the maintenance and repair of Hydro vehicles and equipment.

Suggested Assignment:

Machinists (Auto-Diesel Mechanics)	- Maintenance and repair of vehicles, miscellaneous tools and equipment.
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Operating Engineers (Heavy Duty Mechanics)	- Maintenance and repair of heavy construction equipment."
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The Machinists take the position that the work in dispute which is essentially the maintenance and repair of certain types of construction equipment was assigned to them at that mark-up meeting. The unusual element about this case as the evidence discloses is that this decision at the mark-up meeting was done under the mistaken belief that no assignment had been made of the work in dispute, whereas the respondent, Operating Engineers, claim that the work has in fact been done since the first operating engineer mechanic arrived at the Darlington job site in June of 1980.

3. In accordance with the Board's Practice Note 15, all of the parties to this dispute participated in a pre-hearing conference. That conference resulted in an

extensive agreement between the parties as to the basic facts upon which this dispute should be adjudicated, and the parties are to be commended for their efforts with regard to the pre-hearing conference.

4. At the pre-hearing conference there was an agreement as to the definition of the work in dispute. In the course of the hearing, this work was sometimes referred to as "small or minor construction equipment repairs". The exact definition of the work in dispute agreed to by the parties is as follows:

"14. The work in dispute in this complaint is the maintenance and repair of the following at Ontario Hydro's Darlington Nuclear Generating Station: portable gas heaters, air-operated winches (with 4,000 pound capacity), hydraulic and mechanical work platforms ("man hoists" with 225 to 350 kilogram capacity), portable gas powered lighting generators (with 3 to 6 kilowatt capacity), portable concrete mixers, portable grout pumps, portable grout mixers, concrete finishing power trowels, chain saws (including all repairs but not including sharpening of the saws), vehicle wash units, portable sand blasters, portable gas driven pumps (with discharge of up to 4 inches), vibratory rollers (walking type compactors that would normally be operated by a labourer in the construction industry), mechanical work on electrical welding machines (limited to the parts which are not normally maintained or repaired by electricians, i.e., pumps, fluid drives, wheels, frames), air track drills, and mechanically activated cable suspended work platforms."

At this point it is perhaps worth noting that the equipment repaired is small equipment and does not include what might be termed "construction tools". This failure to distinguish between the repair of construction tools and the repair of small or minor construction *equipment* probably gave rise to the initial confusion in the present case.

5. As we have noted above, the suggested assignment by Ontario Hydro at the mark-up meeting was to assign miscellaneous tools and equipment to the I.A.M. It is clear that Ontario Hydro intended this assignment to reflect the practice at the existing shops at the Pickering Generating Station project. However, it appears that in the course of preparing the proposed assignment, when a check was made at the Darlington site about whether small or minor equipment was being repaired, it would appear that the confusion was with the repair of construction tools and those preparing the mark-up meeting were not informed that in fact minor construction equipment had been repaired from the very start of construction at Darlington. Whatever the source of confusion, however, the evidence is clear that from June, 1980 when the first operating engineer mechanic arrived at the Darlington site, as a regular part of his duties work was performed on construction equipment of the type referred to in paragraph 4 as part of the work in dispute as a regular course of his duties. Thus, if a piece of equipment of the type listed in the work in dispute required repair work the operating engineer mechanic would normally go out to the equipment and effect a repair or have it brought to the shop area and repair it. This had been going on for a year prior to the mark-up meeting at which the proposed assignment was made to the Machinists Union.



6. The fact that this repair work had been going on for a year prior to the mark-up meeting, leads us to the first issue in the present case. Counsel for the respondent, Operating Engineers, argues that the Board ought not for policy reasons disturb a work assignment which has gone on for such a length of time. The representative for the applicant takes the position that this is of no importance and that the Board should look to the mark-up meeting and the actual language of the mark-up meeting in terms of making the present assignment. We are of the view that in the interests of stability on construction sites, the Board should not as a matter of policy disturb assignments which have gone on for a period of time unquestioned. In this regard, we would note that other tribunals dealing with jurisdictional disputes, such as the Impartial Board for the Settlement of Jurisdictional Disputes and its predecessor, the National Joint Board developed similar procedural rules about the bringing of a jurisdictional claim as quickly as possible and that a failure to do so results in a refusal by such tribunals to change an assignment. Clearly, in the present case the complainant I.A.M. was in a position to know that small equipment was being repaired at the Darlington site by the operating engineer mechanics, and its delay in bringing this complaint is sufficient for the Board to refuse to exercise its discretion under section 91.

7. Although we would be prepared to dispose of the complaint on that ground, we shall go on to consider the merits of the complaint in view of the evidence before the Board concerning the respective jurisdictional claims of the two competing trade unions of the request by the respondent that the Board direct Ontario Hydro to assign the work to its members. The criteria on which the Board normally deals with jurisdictional disputes are collective agreement claims, jurisdictional arrangements between unions, area practice, skills and training, and economy and efficiency. With respect to several of these headings it is clear that both parties have collective bargaining agreements with the respondent employer that neither of them have jurisdictional arrangements between them and that both have members with the skills and training to provide the mechanics to perform the work in question. It is clear then that these three criteria favour neither of the competing unions and cannot form a basis for decided between the two.

8. With respect to the heading of economy and efficiency the argument made by the representative for the complainant is that the wage rate in the Machinists agreement is lower and, therefore, that criteria favours an assignment to the I.A.M. The Board has on a number of occasions indicated that "a trade union can't buy jurisdiction" by being prepared to do the work for a lower wage rate than the competing trade union. The factors considered by the Board under this heading are the output per man hour by the competing trades and factors such as the overall flow of work. Clearly, on these grounds neither trade union has a distinct advantage.

9. This leaves the remaining criteria of area practice. In this regard, the I.A.M. claims that the practice in the Pickering shops should be transferred to the Darlington shops. Apart from the fact that such a practice is a practice in a different Board area than the area in which the Darlington site is located, the agreed facts concerning area practice which arises out of the pre-hearing conference are that the Operating Engineers have the overwhelming area practice with respect to the repair and maintenance of equipment covered in the agreed work in dispute set out in paragraph 4 above. On this basis, therefore, the area practice criteria completely favours the respondent, Operating Engineers over the complainant, Machinists Union.

10. In summary then, it is clear that on the merits of the case, the application of the Board's usual criteria favours an assignment to the respondent, Operating Engineers. Thus, we affirm the original, although inadvertent, assignment by Ontario Hydro to the Operating Engineers.

11. In view of the foregoing, the Board directs that the respondent, Ontario Hydro, continue to assign all work in relation to the maintenance and repair of the following at Ontario Hydro's Darlington Nuclear Generating Station: portable gas heaters, air-operated winches (with 4,000 pound capacity), hydraulic and mechanical work platforms ("man hoists" with 225 to 350 kilogram capacity), portable gas powered lighting generators (with 3 to 6 kilowatt capacity), portable concrete mixers, portable grout pumps, portable grout mixers, concrete finishing power trowels, chain saws (including all repairs but not including sharpening of the saws), vehicle wash units, portable sand blasters, portable gas driven pumps (with discharge of up to 4 inches), vibratory rollers (walking type compactors that would normally be operated by a labourer in the construction industry), mechanical work on electrical welding machines (limited to the parts which are not normally maintained or repaired by electricians, i.e., pumps, fluid drives, wheels, frames), air track drills, and mechanically activated cable suspended work platforms to members of the Operating Engineers Union.

**0318-83-M United Brotherhood of Carpenters & Joiners of America, Local Union 18, Applicant, v. Osgood Floor Coverings Limited, Respondent**

**Adjournment - Construction Industry Grievance - Practice and Procedure - Employer's request for adjournment due to prior commitment of counsel denied - Board policy on adjournment in construction industry grievance referrals**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members, I. M. Stamp and H. Kobryn.

**APPEARANCES:** *Stanley Simpson and J. Tarbutt for the applicant; Richard J. Perron for the respondent.*

**DECISION OF THE BOARD;** June 8, 1983

1. This is a referral of a grievance to the Ontario Labour Relations Board pursuant to section 124 of the *Labour Relations Act*.

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3. The material referring the grievance to the Board was received by the Board on May 11, 1983. On May 13, 1983 the Board sent notice of the referral to the respondent stating that a hearing into the referral would be held on May 25, 1983. In that section 124(2) of the Act expressly requires that the Board hold a hearing into a referral within fourteen days of its receipt, May 25, 1983, was in fact the very last day the Board could have set the matter down for hearing. At the hearing, Mr. Perron of the respondent advised the Board that he had received notice of the hearing about ten days previously.

4. At the commencement of the hearing, Mr. Perron requested an adjournment of the proceedings. The sole basis for the request was that because of certain prior commitments his lawyer was unable to be in attendance. The requested adjournment was strenuously opposed by the applicant.

5. The Board's general policy with respect to adjournments was capsulized in the *Nick Masney* case [1968] OLRB Rep. 823 (upheld in the Ontario Court of Appeal, ¶70 CLLC ¶14,024) where the Board stated:

“...the Board's decision to deny the respondent's request for an adjournment was based on the Board's practice to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party, i.e., where it is proven that a witness essential to the party's case is unable to attend because of a serious illness...”

In line with this general practice, the Board in the *WEB Offset Publications Limited* case [1978] OLRB Rep. Nov. 1052, indicated that if a party's first choice of counsel is not available to act on a date set for a hearing, that party is expected to retain other counsel who is available to act.

6. Because of the fluctuating nature of employment in the construction industry, the time required for “normal” arbitration procedures often results in those procedures being unsuitable. In the result, prior to the enactment of what is now section 124 of the Act it was not unusual for parties to engage in “self-help” remedies in response to alleged violations of collective agreements. Through the enactment of section 124 the Legislature sought to remedy this situation by providing for the arbitration of construction industry grievances by this Board and by requiring that grievances be listed for hearing within fourteen days of being referred to the Board. These considerations strongly weigh against any departure from the Board's general adjournment practice when dealing with section 124 grievance referrals.

7. The Board's general practice with respect to adjournments was followed in an earlier grievance referral, namely the *Avenue Structures* case [1979] OLRB Rep. Nov. 1036. In that case several employers referred a grievance to the Board claiming damages against the very trade union that is the applicant in the current proceedings. The union requested an adjournment of the proceedings because on the day set for the hearing the lawyer who usually acted for the union was otherwise engaged, and because the business manager of the union had already planned to be on vacation that day. The Board denied the union's request for an adjournment.

8. Having regard to the above considerations, on May 25, 1983 this panel of the Board orally denied the respondent's request for an adjournment. This panel also indicated that due to scheduling considerations, the merits of the grievance would be heard by a differently constituted panel of the Board later in the day.

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**0023-83-R** United Brotherhood of Carpenters and Joiners of America, Local Union No. 446, Applicant, v. **Pitts Engineering Construction**, a division of Banister Continental Ltd., Pitts Atlantic Construction Limited, Banister Continental Ltd., Respondents

Sale of a Business - Union having bargaining rights for two corporations - Two corporations merging with third and operating as division of third corporation - Sale declaration naming only division as successor employer

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members J. Wilson and C. A. Ballentine.

***APPEARANCES:** Michael A. Church, Matti Rissanen and Karl Ball for the applicant; Brian P. Smenk and F.A.M. Tremayne for the respondents.*

### **DECISION OF THE BOARD;** June 2, 1983

1. This is an application under section 63 of the *Labour Relations Act* for a declaration that there has been a sale of a business by Pitts Engineering Construction Limited and Pitts Atlantic Construction Limited to Banister Continental Ltd. Alternatively, the applicant seeks a declaration under section 1(4) of the Act that the three respondents be treated as a single employer for purposes of the Act.

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3. The facts in this matter are uncontroverted.

- Pitts Atlantic Construction Limited, which was originally incorporated pursuant to the laws of Newfoundland, was wound up and struck off the Register of Corporations for the Province of Newfoundland as of January 4, 1983, and is no longer in business
- On August 31, 1982 Pitts Engineering Construction Limited amalgamated with Banister Continental Ltd.; of which it had previously been a wholly owned subsidiary.
- Banister Continental Ltd. always had and continues to carry on business in various sectors of the construction industry other than the ICI sector, including the pipeline sector and the sewer tunnels and watermains sector.
- Banister Continental carries on business in the pipeline sector through its Cliffside Construction division.
- Pitts Engineering Construction Limited has carried on business in the ICI sector.
- Upon amalgamation with Pitts Engineering Construction Limited on August 31, 1982, Banister Continental Ltd. established a

division named "Pitts Engineering Construction, a division of Banister Continental Ltd." which carries on business and plans to continue to carry on the business formerly carried on by Pitts Engineering Construction Limited and Pitts Atlantic Construction Limited in the Province of Ontario.

- Banister Continental Ltd. never attempted to hide the fact that Pitts Engineering Limited was a wholly owned subsidiary.
- Pitts Engineering Construction Limited and Pitts Atlantic Construction Limited are bound by the Carpenters province-wide agreement covering work in the ICI sector and, in addition, the applicant union holds all sector bargaining rights for the carpenters and carpenters apprentices in a number of board areas.

4. The union seeks a Board declaration that Banister Continental Ltd. is the successor employer and that the union's bargaining rights in respect of Pitts Engineering Ltd. and Pitts Atlantic Limited are now in respect of the employees of Banister Continental Ltd.; the remaining legal entity. The union argues that the declaration which it seeks would not result in an expansion of its bargaining rights as none of the other operating divisions of Banister employs carpenters or perform the work of the trade. Furthermore, the union asserts that the issuance of the declaration which it seeks is necessary to protect it from any further spin-off by Banister of a division which might perform the work of the trade with non-union tradesmen. The union argues that if it does not assert its claim now it might be found at a later date to have slept on its rights.

5. The respondents argue that to grant the declaration which the union seeks would result in an expansion of the union's bargaining rights to cover all of the Banister operations. The respondents maintain that if the declaration sought was issued it could give rise to a number of jurisdictional disputes especially in respect of certain work performed by its Cliffside Division. Where, as in this case, the parent company had dealt with the union in a straightforward and honest manner and has never attempted to set up non-union divisions or subsidiaries for the purpose of undermining the union's bargaining rights, and where the declaration which the union seeks would result in an expansion of the union's bargaining rights with resultant jurisdictional disputes, the respondents take the position that the declaration which should issue in this case is that Pitts Engineering Construction, a division of Banister Continental Ltd. is the successor employer.

6. The Board has long held that the purpose of section 1(4) and section 63 is to preserve, not to extend, union bargaining rights. The union held bargaining rights for both Pitts Engineering Construction Limited and Pitts Atlantic Construction Limited. These companies now carry on business in Ontario as Pitts Engineering Construction, a division of Banister Continental Ltd. It is the bargaining rights in respect of this latter entity which are the subject matter of this application. We accept the submissions of the respondents that a declaration which confirms union bargaining rights beyond Pitts Engineering Construction, a division of Banister Continental Ltd. would constitute an extension of the union's bargaining rights. Indeed, if this was an application for certification in respect of employees of Pitts Engineering Construction, a division of

Banister Continental Ltd. it would not be open for the respondents to argue that the applicant union must show membership support sufficient to sweep all of the relevant employees in Banister Continental Ltd. The absence of carpenters or carpenters' apprentices presently in the employ of either Banister or Cliffside does not in any way lessen the fact that a declaration that the union holds bargaining rights for Banister Continental Ltd. would constitute an extension of the union's bargaining rights. Finally, neither section 1(4) nor section 63 is designed to deal with hypothetical corporate reorganizations or transactions. If in the future Banister creates another corporate entity to do some or all of the work presently performed through its Pitts Engineering Construction division, the union will be in a position to bring a section 1(4) application. The timeliness of that application will be determined on the basis of when that entity came into being and when the union could reasonably have been aware of its existence.

7. Having regard to all of the foregoing, we hereby exercise our authority under section 63 of the Act to declare that Pitts Engineering Construction, a division of Banister Continental Ltd. is the successor employer in this matter.

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**0269-83-U** Todd Bradley Lindstrom, Complainant, v. 500139 Ontario Inc. Operating as **The Potato Centre**, Respondent

**Health and Safety - Unfair Labour Practice - Remedies - Employer representative settling safety complaint and agreeing to reinstate complainant - Settlement not complied with - Whether employer bound by settlement - Board directing compliance and compensation for lost wages - Request for legal costs denied**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members W. H. Wightman and H. Kobryn.

**APPEARANCES:** *Michael Izumi Nash for the complainant; Douglas Jackson for the respondent.*

**DECISION OF THE BOARD;** June 29, 1983

1. This is the complaint of Todd Bradley Lindstrom who claims that he has been dealt with contrary to section 24 of the *Occupational Health and Safety Act*. In order to understand the context in which this application arises it is necessary to review some of the background and the course of proceedings to date. It may also be useful to briefly review the statutory framework within which the parties' rights must be determined, for it is apparent that the respondent, at least, has been operating without a very clear understanding of its obligations as an employer or the rights of its employees.

2. The *Occupational Health and Safety Act* is remedial legislation designed to promote safety in the work place in a variety of ways. There are regulations for hazardous materials, conditions and toxic substances. There are provisions respecting monitoring and protective devices. Employees have a duty to work safely, use the required protective equipment and report to their employer any hazardous condition of which they become aware. The employer, in turn, is under a statutory duty to ensure that the work place is



safe, that hazardous situations are avoided or corrected, and that the worker himself goes about his duties in a manner which will not give rise to health and safety problems for himself or others. The Act also encourages the formation of committees in the work place to promote an awareness of safety-related issues, investigate potential problems and resolve them through discussion and joint employer-employee initiatives. Finally there are procedures for enforcement of the established safety standards and mechanisms for the investigation and resolution of disputes in the event that the employer and his employees disagree on the existence of a safety hazard. The underlying premise is that "safety is everybody's business", and the best way to avoid accidents is to deal with safety problems before they arise, and before the worker is exposed to potentially hazardous conditions.

3. These themes are reflected in section 23 of the *Occupational Health and Safety Act*. Under section 23, a worker may refuse to work where he has reason to believe that his equipment or the condition of the work place poses a hazard. That work refusal triggers an immediate investigation by his employer and, if the problem cannot be resolved, an inspector from the Ministry of Labour must be called in. The worker cannot be discharged or otherwise penalized because he has expressed such *bona fide* safety concerns; moreover, he need not be proven right to have the protection of section 24. The statute puts a premium upon prudence and caution – as it must, given the variety of circumstances to which its general language could apply. Where an employee expresses such reasonable concerns, he is protected by the Act – even if he turns out to be wrong. We repeat: the statute recognizes that there can be reasonable differences of opinion about safety questions and provides a means for their resolution. An employee cannot be penalized because he refuses to perform work which he has reason to believe may be unsafe.

4. The evidence in this case discloses that Mr. Lindstrom expressed his concern to his employer, was sent home, and subsequently discharged. The employer did not resort to the dispute resolution provision provided in section 23. Mr. Lindstrom then filed a complaint under section 24 of the Act alleging that he had been discharged because he had raised a safety issue as he had a right to do under section 23. That case was scheduled for hearing before this Board on April 14, 1983, but, in accordance with its usual practice, the Board appointed an Officer to meet with the parties and endeavour to effect a settlement of the matters in dispute between them. Notice of the complaint, the hearing date, and the appointment of the Board Officer were served on the respondent.

5. On or about April 22, 1983, in accordance with his mandate, the Board Officer sent the parties the following telegram:

Pursuant to my appointment as Labour Relations Officer in the above matter to confer with the parties to endeavour to effect a settlement of this complaint, I shall convene a meeting of the parties Thursday, April 28th at the Board's Offices, 400 University Avenue, 4th Floor, Toronto, commencing at 10 a.m.

Mr. Lindstrom attended that meeting on his own behalf (i.e., without counsel). The respondent was represented by Douglas Jackson, the company's sales manager. Mr. Jackson also appeared without counsel for, as he told the Board much later, the company president, Douglas Taylor, did not think it was necessary to discuss the problem with a

solicitor. Had the respondent sought the advice of a solicitor upon receipt of the notice of this complaint much subsequent unpleasantness might have been avoided.

6. As a result of the discussions between the parties on April 28, 1983, they entered into a written settlement of Mr. Lindstrom's complaint which reads as follows:

1. This settlement is without prejudice to either party.
2. The respondent will reinstate the Complainant, Monday May 9th 1983 commencing at 6 A.M. without compensation for time lost.
3. The complainant as a result of this settlement seeks leave of the board to withdraw this complaint.

Mr. Lindstrom signed the settlement on his own behalf and Mr. Jackson signed on behalf of the respondent. A day or two later, Mr. Lindstrom was advised that the respondent was not prepared to honour the settlement and give him his job back – hence, the second complaint which is now before us.

7. The *Occupational Health and Safety Act*, like the *Labour Relations Act*, encourages the private resolution of disputes without recourse to litigation before this Board. The Act assumes, correctly in our view, that such private solutions are to be preferred and encouraged. That is why the Board routinely appoints a Labour Relations Officer to assist the parties in this regard. On the other hand, the Act also ensures that a settlement, once concluded, will be complied with, and provides that a failure to comply with a settlement can be dealt with and remedied in the same manner as a complaint of the Act itself. That is what the complainant urges the Board to do in the instant case.

8. In view of the complainant's allegation that a settlement had not been complied with, the Board scheduled a further hearing to entertain the parties' evidence and representations on that issue. The hearing was held on June 6, 1983. Mr. Lindstrom appeared together with counsel. Once again, the respondent was represented by Douglas Jackson, its sales manager, who appeared without counsel. Mr. Jackson told the Board that, as before, he had raised the matter of taking legal advice with the company president but had been advised that it was unnecessary.

9. Mr. Jackson testified that Douglas Taylor, the company president, has no active role in the day to day running of the firm, although his signature is necessary for cheques and he is responsible for financial decisions. The day to day running of the plant, however, is left to Mr. Jackson who is assisted by a production supervisor who reports to him. It is Jackson who does the hiring and firing. It was Jackson himself who discharged Mr. Lindstrom, and who advised the office secretary on the appropriate entries to make on his termination documents. In his capacity as sales manager, Mr. Jackson also deals with problems of marketing and delivery of the company's product, does the invoicing, supervises sales, purchase orders, outstanding accounts, and credit, monitors receivables, and signs contracts on behalf of the employer. The prices quoted by Mr. Jackson in these contracts are usually uniform, however, he can vary the price, depending upon the sales volume involved. And, as we have already mentioned, it was Mr. Jackson who appeared on behalf of the respondent on April 28th to discuss settlement of Mr. Lindstrom's initial

complaint, and Jackson appeared on behalf of the respondent at the hearing before this Board.

10. The evidence establishes that on April 28th, Mr. Lindstrom and Mr. Jackson were both making an honest effort to settle their differences. By all accounts, Mr. Lindstrom has been a satisfactory employee and we were impressed by his demeanour in the witness stand and the open and candid way in which he gave his evidence. He was, he said, not seeking a “pound of flesh” or to embarrass the company by filing his initial complaint. He had a *bona fide* concern and at the April 28th meeting, was prepared to look at the problem with some flexibility and accept a compromise – as he eventually did. That compromise involves a waiver of his claim to lost wages following his discharge (to which he would have been entitled had his complaint under section 24 been successful) on the undertaking that he would get his job back. That was the basis for the settlement, which, at the time, seemed acceptable to both parties. Both Mr. Lindstrom and Mr. Jackson left the meeting with the impression that the problem had been resolved.

11. But it was not. The settlement was vetoed by Mr. Taylor, who apparently told Mr. Jackson that the settlement would be regarded as a “slap in the face” to other employees who had been more co-operative and had not raised any complaint. Taylor told Jackson that he was unwilling to have the complainant back because of the effect which his reinstatement might have on these other employees.

12. On the basis of the evidence before it, the Board is not prepared to accept the respondent’s submission that its representative did not have the authority to settle this complaint on April 28, 1983. We find that the settlement document signed on the respondent’s behalf by Mr. Jackson is binding and enforceable, and should have been complied with in accordance with its terms. It was not; and as a result, the complainant has been out of work since May 9, 1983, when he should have been reinstated.

13. There remains the question of the remedy which should flow from what we find to be a breach of the Act. The complainant argues, in the alternative, that he should be entitled to reopen and litigate his original complaint because the employer has reneged on the settlement, or, alternatively, that he should be put in the same position he would have been in if the settlement had been complied with *i.e.*: he should be reinstated, compensated for all wage losses since May 9th when he was to go back to work, and compensated for all legal and other costs expended in the second proceeding before the Board necessitated by the employer’s refusal to abide by its undertaking.

14. We have carefully considered the complainant’s submissions and have concluded that the appropriate remedy is to enforce the settlement in accordance with its terms and direct that the complainant be compensated for the wages and benefits lost by reason of the employer’s failure to adhere to the settlement. The Board therefore directs that:

- (1) the complainant be reinstated in employment forthwith;
- (2) the respondent shall forthwith compensate the complainant for all wages and benefits lost from May 9, 1983 when he should have been reinstated until the date of reinstatement;



- (3) compensation in (2) above shall include a component in respect of interest calculated in the manner set out by the Board in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35.

In all of the circumstances of this case, we see no reason to depart from the Board's established practice in respect of the legal costs associated with proceedings before it. Such costs are not usually awarded and we do not think they should be awarded here. We note that if the complainant had not been successful, the employer would not have been able to get its legal costs either and, in our view, remedies should be reciprocal.

15. We do not wish to leave this matter without stressing, once again, that we make no finding about whether the complainant was "right" in raising a safety concern (as he asserts), or that the respondent was "right" that the work place was in fact safe. Those issues might have been canvassed on a hearing into the initial complaint which the parties settled. The question before us is the enforceability of that settlement and the consequences of non-compliance. We simply observe that the *Occupational Health and Safety Act* itself contemplates and protects employees who raise reasonable safety concerns, even if they turn out to be wrong, and provides a procedure for resolving those concerns.

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**1545-82-R; 1546-82-U** United Food and Commercial Workers International Union, AFL, CIO, CLC Region 18 on behalf of its Local 596, Applicant/Complainant, v. The National Bank, **Price Waterhouse Ltd.**, The Federal Business Development Bank and Touche, Ross Limited, Respondents

**Interference in Trade Unions - Sale of a Business - Unfair Labour Practice - Debenture holding creditor banks appointing receivers for insolvent and defaulting business - Receivers shutting down operations - Hiring some employees for winding down purposes - Receivers agents not successors of employer - No sale of business - Banks and receivers not liable for dues deducted but not remitted by employer - Respondents persons acting on behalf of employer - Refusal to recognize union and collective agreement amounting to unlawful interference - Independently liable for breach**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members M. Eayrs and H. Kobryn.

**APPEARANCES:** *David Starkman, Bernie Hanson, Kevin Corporon and Donald LaRose for the applicant complainant; Gary Grierson, Joel Wiesenfeld and Mike Mueuer for the National Bank and Price Waterhouse Ltd., and D.S. Jovanovic and Ivan McKague for The Federal Business Development Bank and Touche, Ross Limited.*

**DECISION OF THE BOARD;** June 29, 1983

1. This is an application for a declaration under section 63 of the *Labour Relations Act* and a complaint under section 89. These matters were heard together and are hereby consolidated by order of the Board.

2. Windsor Packing Company Limited (hereinafter referred to as ("Windsor Packing")) is in the business of killing and processing pork and beef at its plant in Windsor. In September of 1982 it went into receivership. Under the receiver operations were wound down and, after a time, all of the employees were terminated. The complainant union maintains that the respondents, who are the two debenture holding banks and the receivers acting for them have violated the provisions of section 64 of the *Labour Relations Act* in their treatment of the employees and their union. The union also seeks a declaration that the banks and receivers are transferees of the business of Windsor Packing for the purposes of section 63 of the *Labour Relations Act* and are therefore liable for unsatisfied obligations of the insolvent company to the employees and the union.

3. The facts are not in dispute. The union holds bargaining rights for the production workers of Windsor Packing. A collective agreement was in effect between the company and the union from April 1, 1981 to March 31, 1983. On April 3, 1980 Windsor Packing gave a fixed and floating charge debenture to the Bank of Nova Scotia as security for a loan of seven million dollars borrowed at an interest rate of 25%. It was registered under the *Corporation Security Registration Act* on April 18, 1980. The Bank of Nova Scotia assigned its rights under the debenture to the respondent National Bank of Canada on April 30, 1980, the assignment being registered under the *Corporation Security Registration Act* on the same date. Windsor Packing then gave further security to the National Bank by executing a general security agreement on April 2, 1981 which was registered under the *Personal Property Security Act*.

4. Windsor Packing also borrowed substantially from the respondent Federal Business Development Bank. It took two loans, each for 2.25 million dollars from that bank on September 21, 1981. Those loans were secured by way of a first mortgage on the land, buildings and fixtures of Windsor Packing. The company also gave the Federal Business Development Bank further security in the form of a personal property security agreement under which a number of chattels, including furniture, machinery and office and production equipment were used as collateral to the loan.

5. Windsor Packing then had some eleven and a half million dollars in outstanding credit obligations to the banks. On September 21, 1981 the two creditors, the National Bank of Canada and the Federal Business Development Bank executed a postponement or subordination agreement establishing their respective priorities in the event of default on any of Windsor Packing's obligations. That agreement was duly registered under the *Corporation Security Registration Act* on October 29, 1981. As a result of these commercial transactions the Federal Business Development Bank had a first charge on the land and buildings of Windsor Packing as well as on a number of specifically listed chattels. The National Bank retained a first charge on the inventory of the company as well as against some of its chattels.

6. In September of 1982 it became apparent that Windsor Packing was in serious financial difficulty and would be unable to meet its loan obligations. On September 21, 1982 the National Bank made a written demand on Windsor Packing for the payment for several millions of dollars. The company responded in writing on the same date that it was insolvent and could not meet the demand. On the same day the National Bank named the respondent accounting firm Price Waterhouse Ltd., (hereinafter "Price

Waterhouse”) receiver under both of its securities, the debenture security and the general security. On September 21, 1982 Windsor Packing consented to the appointment of the receiver.

7. The impact on the employees was swift. Late in the same day, pursuant to their appointment, Price Waterhouse went into possession of Windsor Packing’s premises in Windsor. It did so between shifts, on the evening of September 21, 1982. The representative of the receiver advised the employees of the receivership, indicating to them that it intended to act as a receiver-manager pursuant to the provisions of the National Bank’s security. A receiver-manager has latitude to make decisions on the economics of operating, ceasing to operate or selling a business in the interests of its client. On the morning of September 22, 1982 the receiver-manager communicated to the employees that the business of Windsor Packing would not be carried on. The employees were informed that under the receivership no guarantees could be made with respect to the payment of back wages, vacation pay or any other outstanding obligations owed by Windsor Packing to its employees. The employees were advised that the receiver would need a certain number of employees for a time to assist it in winding down operations and liquidating inventory. Of the 85 employees then at work the receiver hired approximately 23 to work in the shutting down of operations. Obviously employees would not accept to work for the insolvent Windsor Packing, and it is common ground that they were then hired by Price Waterhouse as its own employees. It is not disputed that the employees were retained not for the purpose of continuing the operation of the business but for inventory taking, completing work in progress, ensuring the security of the plant and selling the fresh meat that was left. The 23 employees retained were released from their employment by the receiver gradually as those processes unfolded. By the end of October there were no employees left.

8. The receiver did not observe the terms of the collective agreement for that continued period of employment. It did not apply seniority or other provisions of the agreement in the selection of the employees it offered to retain nor did the receiver observe any of the obligations of the collective agreement with respect to benefits. The employees who were retained were paid the wage rates which they had previously been paid under the collective agreement, but in the submission of counsel for Price Waterhouse that was a business decision entirely in the discretion of the receiver. No union dues was deducted or remitted.

9. On September 24, 1982, having learned of the receivership established by the National Bank, the Federal Business Development Bank appointed the accounting firm of Touche, Ross Limited as its receiver. Since then the two receivers have cooperated in an attempt to maximize what their respective principals will realize on their security. Initially they attempted to try to sell the business as a going concern, but that attempt met with no success. As a result both banks were put in a position of selling off the assets against which they had security, and that is what ensued. It appears that up to the date of the hearing the Federal Business Development Bank had also attempted without success to sell the land and buildings of the insolvent company.

10. The final pertinent fact respecting the receivership is that the insolvent company had no liquid assets that the receivers could take over. The net balance of its three bank accounts was an overdraft as of September 21, 1982 when the initial receiver went into possession.



11. To summarize, Windsor Packing defaulted on its secured obligations to the National Bank and the Federal Business Development Bank. The banks privately appointed Price Waterhouse and Touche, Ross Limited as receiver-managers respectively. Both receivers decided that the business could not be sold as a going concern and opted to realize the banks' securities to the extent that they could against the assets of the insolvent company. Price Waterhouse hired some 23 employees who were retained in diminishing numbers until the plant and premises were entirely mothballed as of the end of October. Price Waterhouse did not observe the terms of the collective agreement either in the selection of which employees would be retained, or in any of their terms and conditions of employment or layoff, save that for convenience it continued to pay them the rates of wages they had been getting under the collective agreement. It did not deduct or remit union dues.

12. There are two supplementary facts, not necessarily critical to the application or complaint. At the instance of an unsecured creditor a petition in bankruptcy was issued on October 18, 1982 and a subsequent receiving order was made on November 23, 1982. At law, therefore, the Windsor Packing has been a bankrupt corporation since October 18, 1982. It also appears that the banks have instituted court actions against the directors of Windsor Packing.

13. The union submits that the foregoing facts disclose that there has been the transfer of a business within the meaning of section 63 of the *Labour Relations Act*. It maintains that when the banks and their receivers took over the assets and undertaking of Windsor Packing, along with the effective control of the labour force of the insolvent, they became successor employers bound not only to honour the continuing obligations under the collective agreement but to make good any undischarged obligations of the insolvent Windsor Packing. To that end it seeks a declaration that the respondents are successor employers within the meaning of section 63 of the *Labour Relations Act*.

14. There are two dimensions to the union's complaint under section 89 of the Act. First it submits that if the respondents are successor employers they are under an obligation to pay dues which it is agreed were previously owing to the union and went unpaid by Windsor Packing. They submit that the failure to remit those dues, as well as dues owing for the period of the winding down under the receivers, constitutes an unlawful interference with the administration of a trade union contrary to section 64 of the Act. Alternatively they submit that if none of the respondents are successor employers within the meaning of the Act they are, nevertheless, in violation of section 64 by their failure or refusal in disposing of the assets of the insolvent company to remit to the union dues previously deducted from the wages of employees and held in trust for the union. It submits, in other words, that any monies so deducted never were the assets of Windsor Packing and cannot be dealt with as such by the receivers. In this regard it is not disputed by the parties that the unpaid dues for the period prior to the receivership relate to one month and amount to approximately seventeen hundred dollars.

15. It is also not disputed that there was no money in the bank accounts of the insolvent from which the receivers could pay the union dues not remitted by Windsor Packing. Counsel for Price Waterhouse submits that the receiver would be in an obligation to pay such funds only if they had been segregated so that they could be traceable as trust funds held for the benefit of another by the insolvent. On the facts that has not occurred.

16. Counsel for the union submits, nevertheless, that as successor employers under the Act the respondents are responsible for the payment of those dues. Alternatively he submits that even if the respondents are not successor employers they are liable to pay the unpaid dues either out of their own assets or out of the assets realized by the sales of the chattels or land of the insolvent company.

17. In a number of cases in recent years, labour boards have been required to determine the labour relations consequences of both court appointed receivership and, as in this case, the appointment of a receiver under a private instrument. In *Price Waterhouse Ltd.*, [1979] OLRB Rep. Jan. 50 the Board was called upon, apparently for the first time, to determine whether a receiver-manager assuming control of an insolvent business is a successor employer for the purposes of section 63 of the Act. In that case the Board concluded that no sale had occurred within what was then section 55 of the Act, reasoning as follows at p. 51:

The Board considers that this application has been prematurely brought. In order for a sale of a business within the meaning of Section 55 to occur, it is necessary that there be a disposition from, in this case, the employer that is party to the collective agreement to another person. An examination of the relationship existing between the company and the respondents reveals that this has not yet occurred. What has happened is that a receiver has been appointed to manage the business – so that the Bank which holds a first charge on the assets and undertaking may enforce its security. Although the receiver is carrying on the business for the benefit of the Bank to which it owes a fiduciary duty, its actions are those of the company which retains the legal and equitable ownership of the assets. Under the terms of the debenture constituting the receiver as the agent of the company, the company is “solely responsible for the receiver’s acts or defaults and for its remuneration and expenses”. In these circumstances, it cannot be said that a disposition within the meaning of Section 55 has occurred.

It should be emphasized that the result of our decision is not that the bargaining rights of the applicant have been lost which was the result in all previous proceedings in which a Section 55 declaration was refused by the Board. As was recognized by counsel for the respondents, the company’s obligations both under the Act and the collective agreement were not extinguished by the appointment of the receiver. So long as the business continues to function, those obligations persist. For that reason, the receiver has continued on behalf of the company to honour the collective agreement.

18. The union submits that this Board should now depart from the approach which it took in the *Price Waterhouse Ltd.* decision. It submits that the Board should view the appointment of Price Waterhouse as being tantamount to a take-over of a business pursuant to a conditional sales contract. Counsel for the union submits that in effect what transpired between Windsor Packing and the National Bank was a sale of the business conditional on payment of the outstanding loans. He argues that to the extent that a

failure of the condition allowed the National Bank to take over the assets and run the business of Windsor Packing it should be viewed as a sale or disposition of the business. He urges the Board to look at the transaction not from the standpoint of commercial law but from the viewpoint of labour relations, with particular emphasis on who has control over the employees. The union stresses that it is not insignificant that the successor right provisions in the *Labour Relations Act* constitute a distinct departure from the common law jurisprudence. He submits that section 63 rights are not co-extensive with commercial ownership or commercial law concepts and that what may be a sale in the world of commerce is not necessarily what amounts to a sale under the *Labour Relations Act*. He stresses that under the Act a sale or a transfer of a business may occur where there is something less than the transfer of the legal ownership of property, and that what may be a sale for the purposes of the *Labour Relations Act* may not be for commercial law purposes.

19. Counsel for the union accepts that there is no form of bad faith in the insolvency or the receivership. He makes no suggestion that either the insolvent or its creditors constructed this unfortunate financial demise to defeat the union's bargaining rights. He submits, however, that section 63 of the *Labour Relations Act* should be interpreted and applied so as to protect the collectively bargained rights of employees which would otherwise be truncated by the actions of the banks and receivers.

20. The union submits that in considering the obligations of a receiver under the Act the Board ought not be deflected from the realities of the transaction by the plea of the receiver that it is the agent of the insolvent company and that obligations should continue to run solely against the insolvent. He reminds the Board that the provision for the appointment of a receiver was put into the security agreements in the interests of both parties, as a boiler plate provision with great commercial law of significance. He maintains that in practical terms the notion that the receiver is the agent of the insolvent company can have little significance for the purposes of the *Labour Relations Act*. He stresses that when the receiver was appointed the directors and owners Windsor Packing had no real control over the enterprise. The appointment of the receiver at the instance of the bank entirely displaced them. The union asks what kind of agency is established where the agent tells the principal what to do. The banks, through their agents the receivers, instruct or control Windsor Packing in doing those things that are necessary to protect their interests. Windsor Packing does not decide to shut down or to hire or fire employees. All operating decisions are made by the banks through the receivers who exercise complete control over the assets and undertakings of the insolvent company. The union submits that the receivers are the agents of the insolvent company on paper only. In fact, it says, they are not the agents of Windsor Packing, as it is inconsistent with the very notion of agency for the principal to be instructed and directed by the agent rather than vice versa. Counsel for the union submits that the concept of agency is still more of a sham when, as in the instant case, the directors of Windsor Packing are being personally sued by the banks which are instructing the receivers.

21. The parties addressed the issue of whether the sale of a business for the purposes of the Act is affected by the fact that the receivers decided not to carry on the business. Counsel for the union submits that it is no answer to its application under section 63 of the Act to assert that the business was discontinued. The union bases its rights on the commercial relationship between the banks and the insolvent company and



submits that those rights endure and continue to operate through the entire period that the respondent Price Waterhouse hired employees from the bargaining unit to assist in disposing of inventory and assets and closing down the plant. Its counsel points out, moreover, that the decision to close down is not irrevocable. The receivers remain free to re-open the plant at any time and continue it as a going concern. The union argues that whether the receivers transfer the business to a third party, operate it only for the purposes of winding it down or continue to operate it as a going concern, its bargaining rights and the rights of the employees are in no way affected.

22. Counsel for the union sees no hardship or injustice to the banks if they should be found to be successor employers within the meaning of the *Labour Relations Act*, in consequence of which they will be liable to the unsatisfied collective agreement obligations of the insolvent Windsor Packing. He maintains that when the banks chose to realize upon their security rather than to either sue and obtain executions for the amounts owing or opt for a petition in bankruptcy they chose a course with both advantages and risks. He submits that if they are to have the advantage of their credit priority based on their security they accept certain risks that go with receivership. In his view if a receiver has the choice of running the business or not, it should be liable to be seen as a transferee of the business for labour law purposes just as it might be for the continued payment of rents, taxes, and utilities obligations. It is agreed the receiver would pay arrears of that kind to protect its principal's security and enable it to keep doing business. The union submits that if a secured creditor decides to exercise the option of realizing on its security it must also accept obligations that are due to the employees of the undertaking.

23. Both counsels for the respondents submit that the Board should not depart from its past jurisprudence. They express concern that the real purpose of the application and complaint is to put the union in the fortuitous position of realizing what would otherwise be uncollectable claims out of the "deep pocket" of the creditor banks. They emphasize that if the insolvent company had had no secured credit obligations but had merely foundered on its own into general bankruptcy, after winding down and mothballing the plant itself, the union would be out of luck, or, at best, in the same position as all other unsecured creditors. In their view if the realities are to be looked at it is unrealistic to say that the banks or their receivers took over the business in the sense of a transferee under the *Labour Relations Act*, with a view to continuing a meat packing business and the employment relationships that go with it. They submit that the banks did not want to run a meat packing business or dispose of its assets save for the limited purpose of protecting their loans and realizing as best they could on their security. They maintain that this is not a circumstance in which the banks should be judged either partners or successors to the insolvent company.

24. Counsel for the respondents submit that there is an important purpose underlying the agency concept recognized by the Board in the *Price Waterhouse Ltd.* decision. They stress that as of the bankruptcy on October 18, 1982 the corporate identity of Windsor Packing vested in the court appointed trustee in bankruptcy. They submit that as a matter of law with the imposition of the bankruptcy, the insolvent company is in effect gone and that no concept of agency can be argued after that point. From then on the receiver's duty is strictly a fiduciary duty owed to the bank on whose behalf it controls assets. It would appear, in other words, beyond dispute that after the bankruptcy

there could be no possibility of the receivers deciding to re-open or carry on the business of Windsor Packing as a going concern. At best, therefore, the receivers were agents of the insolvent company only for a brief period of time between the initial appointment of a receiver on September 21, 1982 and the bankruptcy on October 18, 1982.

25. Counsel for the receivers raised the fact that the union has filed a grievance against the insolvent company for the payment of its undischarged obligations under the collective agreement. While they acknowledge that the likelihood of recovery against the bankrupt company is virtually non-existent they submit that the union's plight in that regard is no different than that of other unsecured creditors with whom it must line up in the bankruptcy. They maintain that section 63 of the Act should not be converted into a provision which effectively undoes established commercial law priorities and the rules of recovery in bankruptcy.

26. The thrust of the submission for the respondent banks and receivers is that the provisions by which they have secured their loans to the insolvent Windsor Packing should be carefully circumscribed to the debtor-creditor relationship that is the essence of the arrangement. They submit that the Board should not lightly dismiss the legally established concept of agency that runs between both the receivers and the banks and the receivers and the insolvent company whose business they administer.

27. The authorities on the status of receiver-managers for the purposes of labour relations obligations provide considerable guidance to the resolution of this matter. This Board has in the past found that a court appointed receiver-manager may be the employer for the purposes of an application for certification (*Mount Citadel Ltd.* [1976] OLRB Rep. July 367; *Guarantee Trust Company of Canada* 47 CLLC ¶16,500.)

28. Distinctions are made in the cases between court appointed receiver-managers and receivers as well as receiver-managers who are privately appointed. In *Uncle Ben's Industries Ltd.* [1979] 2 Can. L.R.B.R. 126, the British Columbia Labour Relations Board concluded that a court appointed receiver-manager was a transferee within the meaning of section 53 of the *British Columbia Labour Code*. In that case the Board stated:

There are three possible approaches which might be taken in the Receiver-Manager situation. First would be to conclude that no sale, lease or transfer has taken place within the section; that nothing has happened; that the labour obligations, if they may be so termed, still rest upon the shoulders of the old employer. This is obviously not a solution. The employer is by definition out of control of the business and could not act to honour its obligations even with the best of intentions.

The second approach is to conclude that the Court appointment brings the Receiver-Manager within the concept of "transferee" in the section. This would do no great violence to the concept of transferee, since he is for all relevant purposes in the same position as a legal title-holder acting as administrative trustee; he (if anyone) can enter into contracts, direct and control the business, and eventually pass full title to a new purchaser, under an appropriate order of the court.

He may operate for the ultimate benefit of various creditors, but the business is a going concern has been transferred to him.

The third approach is to consider the situation as one covered by the general words of "other disposition" and much the same arguments can be made, without running into technical problems with the definition of "transferred". In the final result it does not matter which of the last two is chosen: Section 53 should apply to a Court appointed Receiver-Manager.

29. The rationale for the Board's decision in *Uncle Ben's Industries Limited* is that a court appointed receiver-manager is a transferee of the business within the meaning of section 53 only to the extent that "the business as a going concern has been transferred to him". In that case the Board made it clear that the determination of whether there has been a transfer of the business depends in large measure on its continuation as a going concern by the receiver. At page 138 of the decision the Board stated:

If there had been only a Receiver, who did his best to salvage the assets, but never re-opened the business the "termination" thus caused would have given the union or employees merely the right to line up with ordinary creditors, for the severance pay. But on the day that the Receiver-Manager commences operations, suddenly this less than perfect claim leaps to the fore as a Section 53 claim, and ranks with the new contracts which the Receiver-Manager is now creating.

30. It would therefore appear that under the British Columbia Labour Code a court appointed receiver-manager may be viewed as a successor if he maintains the business as a going concern. The distinction between court appointed and privately appointed receiver-managers, however, appears to remain significant. The British Columbia Labour Board has recognized the distinction, first touched upon in *Mount Cidatel Ltd.*, by this Board, that the court appointed receiver-manager acts as a principal and not as an agent of the insolvent company. It was on the basis of the agency relationship existing between the privately appointed receiver and the insolvent company that this Board found as it did in *Price Waterhouse Ltd.*, [1979] OLRB Rep. Jan. 50. We concluded in that case that where a receiver-manager assumes control of the business pursuant to a private debenture by the terms of which it was expressly made an agent of the insolvent company a sale or transfer of a business did not occur within the meaning of section 63 of the *Labour Relations Act*.

31. A similar conclusion was reached by the Canada Labour Relations Board in *Ontario World Air Ltd.*, [1981] 2 Can. L.R.B.R. 405. That case involved an instrument appointed receiver-manager who continued the operation of an insolvent airline with a view to selling the assets and business as a going concern. The receiver-manager refused to pursue negotiations for a new collective agreement which were in progress between the insolvent company and the union on behalf of flight attendants at the time of the appointment. It also declined to honour the collective agreement or, after the appointment of a trustee in bankruptcy, to appoint a nominee to a board of arbitration to deal with grievances based on its default. It appears that in the circumstances of that case that the receiver-manager declined to pay employees' claims arising after its appointment



and prior to the bankruptcy. The trustee in bankruptcy took the position that the receiver-manager was personally responsible for unpaid wages in that period. Faced with a bankrupt employer and collective agreement based claims which neither the receiver-manager nor the trustee in bankruptcy would satisfy, the union sought a declaration that either the receiver-manager, the trustee in bankruptcy or the creditor banks were bound by the terms of the collective agreement as successor employers. In declining relief the Canada Board made the following observations:

The Board may sympathize with the desires of the union to have the price of labour extracted in collective bargaining and promised by the receiver-manager recognized in priority to the claims of any other creditor when the estate of the employer is divided. The Board, aware of sound policy reasons to place wage claims in priority over other creditor claims, fully understands the union desire to find a solvent person whom it can hold accountable. (The trustee in bankruptcy calculates known wage claims at \$353,067.01. For discussion of wage recovery and priority policy, see Owen Grey, *Wage Protection: Collection of Wages, Priority of the Wage Claim, Securing the Wage Claim* (Labour Canada, 1973) and Innis Christie and Brent Cotter, *Employment Law in Canada* (1981) Chapter 8.) We may also have strong emotions about the behaviour of a receiver-manager who ignores legitimate interests and legal claims of employees and bargaining agents in the pursuit of financial interests of those who appoint and pay it. We may not equate that with good corporate citizenship, but that is not our concern in these proceedings. We merely endorse what counsel for the receiver-manager recognized - it is the receiver-manager's responsibility to cause the debtor-employer to respect its obligations under the collective agreements.

32. While the Canada Board concluded that no sale of a business had occurred, it was not in that case asked, as we are, to consider the merits of an unfair labour practice complaint against the receiver. Only one case has been cited to us by the applicant where it was found that a receiver, in circumstances almost identical to the instant case, was a successor employer for the purposes of collective bargaining obligations. In *Re St. Louis Bedding Company*, (1982) 42 Canadian Bankruptcy Reports, 75 the Quebec Labour Relations Board, through the ruling of a labour commissioner, found that the transfer of a business had taken place. In that case on April 23, 1981 a creditor bank appointed a receiver to take possession of inventories to protect its security as a result of the company's default on its loan. The receiver entered into possession and continued the operations, involving the manufacture of mattresses, from April 24, 1981 to May 29, 1981. It operated the business strictly for the purpose of completing work in progress from raw materials on hand. It appears that the employees were told as of April 23, 1981 that they were working for a new employer and that operations would cease on May 29, 1981. After May 29, production ceased but a number of employees were retained for several more weeks for the purposes of selling off the inventory and winding down the operation. The labour commissioner concluded that for the period of April 21, 1981 to May 29, 1981 the receiver was a successor employer within the meaning of section 45 of the Quebec Labour Code.

33. The Board concluded that only so long as the receiver continued operations it was a successor employer within the meaning of the Code. Its reasoning, however, was not confined to the rationale in the *Uncle Ben's* decision of the British Columbia Board. It turned, in part, on the wording of section 45 of the Quebec Labour Code which provides as follows:

The alienation or *operation by another* in whole or in part of an undertaking otherwise than by judicial sale shall not invalidate any certification granted under this Code, any collective agreement or any proceeding for the securing of certification or for the making or carrying out of a collective agreement.

The labour commissioner found that the receivership fell within the terms of the phrase "operation by another" so as to prevent any invalidation or suspension of collective bargaining rights under the Code. He also concluded that after May 29, when production had ceased, the business had ceased and thereafter there could be no successorship within the meaning of the Code.

34. It is not necessary for the Board to consider in this case what differences, if any, would flow in law from the appointment of a receiver or receiver-manager pursuant to a court order as contrasted with a private appointment. In this case the receiver-managers for both banks were appointed pursuant to private instruments and we are satisfied that this Board's decision in the earlier *Price Waterhouse Ltd.*, case, cited above, is the correct approach for the purposes of the successorship provisions of the *Labour Relations Act*. We share the understanding for the difficulties of the union and employees expressed by the Canada Board in *Ontario World Air Limited*. We can also appreciate the desire of the union to realize its claims out of the more substantial pocket of the banks and receivers. We cannot, however, lose sight of the purpose of the successorship provisions of the Act. Nor can we ignore the economic realities of receivership and bankruptcy when these concepts intersect with labour relations.

35. In a recent decision this Board was called upon to deal with a related issue under section 1(4) of the Act. In *Total Marketing Incorporated*, [1983] OLRB Rep. April 616, the Board was asked by a union to declare that the parent company of an insolvent subsidiary with which it had undischarged collective agreement obligations was a related employer for the purposes of section 1(4). The application was brought solely for the purpose of realizing otherwise uncollectable claims against a related company which was solvent. In declining to exercise its discretion to make a section 1(4) declaration the Board made the following comment:

It is clear that [the insolvent employer] has ceased operations, and that the work which it performed is no longer being done. There has been no transfer of work, and in that sense no undermining or erosion of the applicant's bargaining rights. If it appeared on the material before us that the respondent had spun off a similar company to do identical work the case might be more compelling for relief, whether by way of declaration of successorship under section 63 of the Act or by the application of section 1(4). In those circumstances the Board could, by the operation of section 1(4)

pierce the corporate veil in the interests of protecting the bargaining rights. (See, e.g., *Devon Studio*, [1980] OLRB Rep. July 961). Those facts are not shown in the instant case. The purpose of section 1(4) of the Act is to preserve bargaining rights. It is not intended to give a party to a collective agreement the right to a “deep pocket” recovery of an unsatisfied debt against a related corporation. (See, also, *Chandelle Fashions*, [1982] OLRB Rep. June 828 at 848-49).

36. Here we are asked to turn section 63 of the Act into a device for collecting the employer’s uncollectable collective agreement debts from its solvent creditors. We see nothing in the cases that have been cited, in the arguments submitted by counsel for the applicant nor in the policy ramifications for collective bargaining to cause us to depart in this case from the approach which we took in the earlier *Price Waterhouse Ltd.*, decision. If the receiver in this case ran the insolvent company’s business, assuming that its winding down operation could be so described, the legal interest of the insolvent company never ceased to exist. If, for example, the sale of assets had satisfied the outstanding debt, the business might have been returned as a going concern into the hands of the insolvent company. It would appear to the Board to be unduly artificial to adopt the view of counsel for the applicant that in that case there would first be a transfer of the business to the receiver and then a second transfer back to the original employer. The transfer of a business can have significant impact for notice provisions under the Act, a legality of strikes and bargaining obligations, (see *Vaunclair Meats Ltd.*, [1981] OLRB Rep. Aug. 1186; *Comstock Funeral Home Ltd.*, [1982] OLRB Rep. Oct. 1436; and *Biltmore Hats*, [1983] OLRB Rep. Jan. 9, affirmed.) The Board should therefore not lightly interpret the concept of transfer or sale in section 63 of the Act in a way that would unduly multiply the number of transfers of a business which might occur.

37. With one exception, in all of the cases surveyed the labour relations boards in Canada have interpreted their successorship provisions so as to exclude instrument appointed receiver-managers from the definition of successor employers for labour relations purposes. The exception is the *St. Louis Bedding Company* case, the outcome of which turns on the wording of section 45 of the Quebec Labour Code which expressly includes “operation by another” as a circumstance during which collective bargaining obligations continue. There is no comparable provision in our Act. We are persuaded that the decision of the Board in *Price Waterhouse Ltd.*, [1979] OLRB Rep. Jan. 50 should be followed in the instant case. The receivers in this case were agents of Windsor Packing and the successorship application is therefore misplaced, if not premature. They managed the business for the benefit of Windsor Packing in pursuance of its written authorization in the debenture. We cannot accept the attack on the agency relationship advanced by the union. The debentures were clearly critical for the benefit of the insolvent company. Indeed, it may be safely presumed that the debenture loans were a substantial source of wages and benefits for the employees during Windsor Packing’s unprofitable operations, and as such, was an indirect source of union dues for a number of months. For the foregoing reasons the Board does not find that there has been the sale or transfer of a business within the meaning of section 63 of the *Labour Relations Act*.

38. We turn to consider the merits of the section 89 complaint. The issue is whether the respondents’ receivers have, in their own right, violated section 64 of the *Labour Relations Act*. That section provides as follows:



No employer of employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

39. Before the Board counsel for Price Waterhouse argued that we could not find that there has been a sale of a business principally on the grounds that the receiver-manager was at all times the agent of Windsor Packing. We have accepted that submission. Having done so, we find it difficult to sustain the further argument advanced by the receiver respecting its obligations under the *Labour Relations Act*.

40. It is not disputed that in the period for which it employed some 23 employees from the bargaining unit the respondent Price Waterhouse entirely disregarded the terms of the collective agreement between the complainant and Windsor Packing. While employees were given the same wages as they had under the collective agreement, none of the benefit provisions were observed nor were the seniority, lay-off or other provisions relating to the severance of employment. For the time during which it employed the bargaining unit personnel the receiver either failed or refused to pay any union dues. Although counsel for the receiver did not put it in these terms, it appears on the facts that the receiver based its conduct on the view that the collective bargaining rights of the employees and their union simply ceased upon the private appointment of the receiver.

41. We know of no authority for that proposition. It is significant that this Board's decision in the earlier *Price Waterhouse Ltd.*, case was predicated on the Board's conclusion that the rights and duties under the collective agreement in that case continued in force during the period for which the instrument appointed receiver operated the business. In that case the Board noted with obvious approval that the receiver, acting as agent of the insolvent employer, had continued to observe all of the terms of the collective agreement. Counsel for the Price Waterhouse advanced no argument to satisfactorily explain to this Board why it was open to the receiver in this case to follow a different course and ignore the collective agreement rights of the employees and their union during the period of winding down. If Windsor Packing had itself decided to sell off its inventory and assets and mothball its facilities it could not be seriously contended that the collective agreement would not continue to operate as long as employees were retained for the purposes of shutting down. We do not see how the legal conclusion is any different simply because the agent of Windsor Packing in the person of a receiver-manager has done the same thing. We are satisfied that both in fact and in law, at least from the time of its appointment under the debenture the receiver Price Waterhouse was a "person acting on behalf of an employer" within the meaning of section 64 of the *Labour Relations Act*.

42. It is well established that a person acting on behalf of an employer who violates the Act is liable in his own right, independently of the liability of his principal for his unlawful conduct. By the terms of the debenture Windsor Packing authorized the receiver to operate the business on its behalf, including the authority to wind down or sell

it in whole or in part. Even allowing for the interest of the banks being a primary concern, as we have noted the debenture arrangement was plainly in the interest of Windsor Packing. In these circumstances it is difficult to draw any conclusion but that any receiver appointed would be a person acting on behalf of the insolvent employer for the purposes of section 64 of the *Labour Relations Act*. With the authority to enter into arrangements and make contracts binding on the insolvent company the receiver is plainly acting on its behalf. Significantly, as the Board has stressed, it is not necessary for the person acting on behalf of an employer to act pursuant to its specific instruction for independent liability to attach to the agent for its actions in contravention of the Act. (*Securicor Investigation and Security Ltd.*, [1982] [OLRB] Rep. May 759 and see also the subsequent decision of the Board in the same case reported at [1983] OLRB Rep. May)

43. The refusal of the receiver-manager to recognize the rights of the employees and their union under the *Labour Relations Act* was complete. It behaved, for all practical purposes, as though the union did not exist and the employees had no statutory or contractual rights that must be respected by anyone in charge of their employer's business. We are therefore compelled to conclude that for the entire period of their employment under Price Waterhouse Ltd. the representation of the employees by the complainant trade union and the administration of the union were interfered with by the respondent Price Waterhouse contrary to section 64 of the Act. If it were necessary to do so we would also conclude that the receiver acted in violation of section 66(b) of the Act to the extent that it effectively imposed conditions of employment the terms of which were in violation of the rights of the employees under the Act and under their collective agreement. As the complaint was limited to section 64, the Board makes no order in respect of the payment of compensation, if any should be owing, to the employees.

44. The Board has given careful consideration to the submission of counsel for the union that the respondent Price Waterhouse has further violated section 64 of the Act by failing to remit to the union unpaid dues previously owing from Windsor Packing for the period immediately prior to the receivership. The dues in question are monies which were deducted from the wages of employees by Windsor Packing. As they were never the property of the insolvent employer they would have been held in trust for the benefit of the union. The unchallenged evidence, however, is that no specific trust account or trust funds could be identified by the receiver and, indeed, the bank accounts of the company were in a deficit position. Whether the dues deducted by Windsor Packing are impressed with a trust, the value of which can be realized against the assets of the insolvent company, is a matter to be resolved through the avenues of civil litigation available to the union as a claimant in the bankruptcy. The facts do not disclose that the respondent Price Waterhouse has directly or indirectly appropriated for itself or for the bank which appointed it any union dues or trust funds belonging to the union. The Board's remedy in the circumstances does not, therefore, extend to provide recovery of those sums. The union dues which the respondent receiver is required to remit under this order are limited to such dues as it failed to deduct and remit for the period of time during which it became the effective employer on behalf of Windsor Packing.

45. The Board's findings and order may be summarized as follows:

- (1) The Board does not find that there has been the sale or transfer of a business as a result of the private appointment of receiver-managers

under the security of either respondent bank. It therefore does not grant a declaration that either Price Waterhouse Ltd. or Touche, Ross Limited or the banks which appointed them are successor employers for the purposes of section 63 of the Act.

(2) The appointment of the receivers did not extinguish the collective agreement obligations of Windsor Packing Company Limited. The respondent receiver Price Waterhouse Ltd. hired employees in the bargaining unit. It did so as agent of the insolvent company, acting on its behalf, within the meaning of section 64 of the *Labour Relations Act*. It was therefore, under an obligation to honour the terms and conditions of the collective agreement and the rights of the employees and their union under the Act. The receiver's failure to deduct and remit union dues for the period of its agency relationship with Windsor Packing Company Limited is interference with the administration of a trade union in violation of section 64 of the *Labour Relations Act*. It is also in violation of the rights of its employees to be represented by a trade union.

(3) The respondent Price Waterhouse Ltd. is ordered to pay forthwith all amounts owing in respect of union dues for the period of time for which it acted as employer on behalf of Windsor Packing Company Limited.

46. In view of the fact that the insolvent Windsor Packing Company Limited has ceased to exist by virtue of the bankruptcy and the employment relationship of the employees in the bargaining unit has been effectively terminated, little purpose would be served by a remedial posting order in the circumstances of this case. Therefore none will be made. We remain ceased of this complaint in the event that the parties are unable to agree on the amount of compensation owing to the trade union.

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**0756-82-R** United Food and Commercial Workers International Union, Applicant, v. **Primo Importing and Distributing Co. Ltd.**, Respondent), v. Primo Employees' Association, Intervener

Certification Where Act Contravened – Interference in Trade Unions – Unfair Labour Practice – Prior decision finding employer support for employee association – Union establishing employer support amounting to unlawful interference – Seeking certification without vote – Board finding remedial measures sufficient to redress breach of Act – Directing vote with posting of notice, access to employees and bulletin boards etc

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members  
J. A. Ronson and S. Cooke.

**APPEARANCES:** *James Hayes, Vincent Gentile, Ron Lebi and Stan Henderson for the applicant; R. M. Parry, Arthur Pelliccione and Angelo Capozzi for the respondent; M. G. Horan and M. Zangolli for the intervener.*

**DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER  
S. COOKE;** June 28, 1983

1. This is an application for certification in which the applicant (also referred to in this decision as the “union”) seeks to be certified without a representation vote, pursuant to section 8 of the *Labour Relations Act*, as bargaining agent for a unit of the respondent’s production employees. It is common ground among the parties that if the Board declines to certify the applicant pursuant to section 8, it should direct that a representation vote be taken in order to determine whether or not the applicant is to be certified. The parties are further in agreement that although this matter has come before the Board in the form of a certification application, it is also, in substance, a “complaint alleging a contravention of [the] Act” within the meaning of section 89, which empowers the Board to make appropriate remedial orders in conjunction with a representation vote or a section 8 certificate.

2. In a majority decision dated December 24, 1982 (reported at [1982] OLRB Rep. Dec. 1869) in this matter, the Board, with Board Member J. A. Ronson dissenting, found that an agreement entered into by the intervener and the respondent in July of 1982 was not a collective agreement for purposes of the *Labour Relations Act* by virtue of section 48 of the Act. The Board further found that section 13 of the Act precluded it from certifying the intervener in the circumstances of this case and, accordingly, dismissed the intervener’s application for certification. Although some additional evidence was adduced at the continuation of hearing directed by the Board in that decision, most of the material facts upon which the parties rely in support of their respective submissions at this stage of the proceedings are contained in that decision, a copy of which is attached hereto and marked as Appendix “A”.

3. Following the issuance of the Board’s decision of December 24, 1983 in this matter, the applicant distributed copies of that decision, together with the following letter (on the applicant’s letterhead), to employees of the respondent at the plant gate:

### "UNION WINS AT LABOUR BOARD"

We are pleased to be able to tell you that the Ontario Labour Relations Board has just released its decision which is entirely in favour of the union on all points argued thus far.

A full copy of the Board order is attached but, in summary, the Board decided:

1. The Primo employees' association was supported and assisted by the company. Therefore the association cannot be certified by the Labour Board to represent the workers at Primo.
2. The so-called contract between the Association and the company is *NOT* a legal contract under the Labour Relations Act.

What this means is that the Labour Board has rejected the phoney association and the so-called contract covering the workers.

The Labour Board has ordered that future dates for hearings be established at which time the union can continue its case to represent the workers. We are hopeful that the Labour Board will now be able to certify a proper union for the Primo workers.

Now that the Labour Board has rejected the phoney association, the union is the only chance Primo workers have to obtain a fair deal from the company. Thank you for your continued support! We will keep you informed as the case progresses!"

The respondent later returned to the employees, without comment, the monies which it had deducted from their paycheques pursuant to the checkoff provision contained in the impugned agreement.

4. At the commencement of the continuation of hearing, counsel for the applicant questioned the status of the intervener to continue as a party in these proceedings in view of the Board's dismissal of its application for certification. However, as indicated by the Board at that time, Mr. Zangolli, the president of the intervener, is an employee of the respondent in the bargaining unit for which the applicant seeks bargaining rights. As an employee directly affected by this application who objects to the union's request for certification, he has status to appear before the Board with counsel and participate in the proceedings. Mr. Horan appeared before the Board as counsel for the intervener and as counsel for Mr. Zangolli. Accordingly, the Board found it unnecessary to determine whether the intervener had status to continue as a party, since Mr. Horan would be entitled to participate in the proceedings to the same extent in his capacity as counsel for Mr. Zangolli, as he would be entitled to participate therein as counsel for the intervener.

5. Vincent Gentile, an International Representative and full-time organizer for the applicant, gave evidence about the union's organizational efforts in respect of the respondent's employees. Between 1975 and November of 1979, the applicant assisted

some of the respondent's employees with various work-related matters such as unemployment insurance and workmen's compensation. Although some union cards were signed during that period, there was no "official campaign" until the fall of 1979. That campaign culminated in an unsuccessful bid for certification without a vote pursuant to section 8 (as described in Appendix "A") and a representation vote, held on September 10, 1981, in which 116 ballots were marked against the applicant and 69 ballots were marked in favour of the applicant.

6. Following that vote, counsel for the union advised the Registrar in a letter dated September 16, 1981 that the union would not be seeking to challenge the results of the vote. In that letter he also stated: "The union is in possession of information indicating misconduct both by the employer and objecting employees but will not be relying upon it in this matter." Counsel further indicated that he was advised that the group of objecting employees was "already contemplating forming a company association", and requested that "any bar contemplated by the Board pursuant to section 92(2)(i) [now section 103(2)(i)] apply to any application by or on behalf of the employees of the respondent". In an unreported decision dated October 14, 1981, the Board, differently constituted, wrote as follows in rejecting that request:

"4. The applicant contends that because of the protracted nature of these proceedings and the unusual circumstances of the case, the Board should not follow its usual practice of imposing a bar to a further application by the applicant. The applicant further submits that it has been advised that some of the employees intend to form their own employee organization. However, on the basis of the material before us, the Board sees no reason why it should depart from its usual practice. The length of the proceedings results largely from the consideration of allegations made by the applicant but unsubstantiated by the evidence; and we do not think that it is appropriate to modify the Board's usual practice simply because the respondent's employees *might* choose to form or join another employee organization."

7. Mr. Gentile informed the Board that he did not file unfair labour practices against the respondent in the fall of 1981 because Board notices, even when translated into Italian, do not enable many of the respondent's Italian speaking workers over the age of forty to comprehend the Board's decision, as they are not, in Mr. Gentile's opinion, sufficiently literate to understand "the full text" of such notices. Moreover, Mr. Gentile told the Board that he decided not to file unfair labour practices because he "had a gut feeling" that the union was "going to make it" in their next organizational campaign.

8. Mr. Gentile testified that he "started counting the six months from September 10th" and "showed up at the plant" on March 12, 1983 to renew his organizing efforts. He and other union organizers (who were not employees of the respondent) generally handed out of leaflets to employees at the plant gate once a week, usually on Friday. He described the campaign as "very difficult", "very confusing", and "at times ... very depressing". Mr. Gentile and the members of the union's "plant committee" telephoned and visited many of the respondent's employees at their homes. Most of the employees were visited more than once, and some were visited as many as three or four times. The



union made "fair progress" until late April or early May when the Primo Workers' Committee informed the employees of the wage and benefit improvements which that committee had secured through discussions with management. Thereafter, it became increasingly difficult to persuade employees to join the union. Having obtained almost fifty cards in March and April, the union obtained less than ten further cards in May. It did, however, succeed in signing up fourteen employees in June and a further fourteen employees in July. Indeed, it managed to sign eleven employees into membership between July 12 and July 28, following the July 11 meeting at which the intervener, after attempting to take the necessary steps to become a "trade union", purported to accept the respondent's "contract proposal".

9. Mr. Gentile testified that the applicant, acting on legal advice, decided to file this application on July 16, 1982, even though its organizing drive was not yet completed and even though he thought that if organizing had continued for another month, the applicant "would have made it". His explanation for the decision to file the application in July, instead of waiting until August, was: "We knew there was a contract. We didn't know if it was signed or not. We knew there was an association. We didn't know if it was legal or not. We didn't know if the association could even come to the Board. We didn't know where we stood."

10. As indicated above, the applicant seeks certification without a representation vote pursuant to section 8 of the Act, which provides:

"Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit."

As has been noted by the Board in many cases, certification can be granted under that section only if three conditions are satisfied:

- (1) The respondent must have contravened the Act.
- (2) The applicant must have membership support that, in the opinion of the Board, is adequate for the purposes of collective bargaining.
- (3) The respondent's contravention of the Act must have resulted in a situation in which the true wishes of the employees are not likely to be ascertained.

11. As indicated in paragraph 32 of Appendix "A", it is abundantly clear that the respondent participated in the formation and administration of the Primo Workers' Committee, and also contributed "other support" to it:

“...The respondent not only permitted the committee’s lawyer to attend at the plant to meet with employees about forming a committee (without even inquiring whether or not the meeting would be held during working hours), but also authorized the holding of meetings during working hours at which members of the committee, accompanied and supported by at least one high ranking member of management, explained the operation of the committee. Management also gave the committee ready access to the plant bulletin boards for the purpose of communicating with employees, and paid committee members for the time spent at committee meetings when those meetings were held during working hours. Although management requested that the committee have a representative on it from each department, management ‘recognized’ the committee without taking any steps to determine whether the majority of the employees in the respondent’s workforce had authorized the committee to represent them. Furthermore, when the respondent recognized the committee, management knew that the majority of the ‘representatives’ on the committee were opposed to the applicant, and also knew that, in all probability, the applicant would renew its organizing efforts within a few months. Under the circumstances, we are satisfied that the adverse effect which employee support for a committee could have on any such organizing efforts by the applicant was apparent to management, and was at least one of the factors which prompted management to recognize and otherwise support the committee.”

As the Board observed in *Upper Canadian Furniture Limited*, [1981] OLRB Rep. July 1016, at paragraph 38:

“Even where an employer does not sow the seed of an employee association, its active support for the association may become a potent form of interference in contravention of section 56 [now section 64] of the Act. Given their economic dependence on their employer, employees may be readily swayed by employer conduct, even where subtle, which indicates support for an association over a competing union.”

Similar comments are applicable to employer support for an employees’ committee, such as occurred in the present case.

12. At paragraph 34 of Appendix “A”, the majority of the present panel found “that the ‘taint’ of employer support which was so blatantly conferred upon the committee by the respondent, flow[ed] through to the [Primo Employees’] Association” in the circumstances of this case. Moreover, the respondent’s voluntary recognition of the intervener was found to constitute further support:

“35. In addition to the history of employer support which tainted the Association due to its close ties with the committee, the intervener also received direct support from the respondent in July of 1982 in the form of voluntary recognition in the shadow of the applicant’s

renewed organizing drive and (July 16, 1982) application for certification. As stated by the Board in *Trent Metals Limited*, [1979] OLRB Rep. Aug. 827, at paragraph 8:

‘The Board can think of no more meaningful support in the context of a bi-union contest of membership ... than the extension of recognition to one of the two unions. The effect of such recognition is to indicate the employer’s desire to deal with that union to the exclusion of the other and to thereby chill, if not destroy, the organizing campaign of the unrecognized trade union.’”

For the reasons set forth in paragraph 28 of Appendix “A”, we also find that a desire to thwart the applicant’s ongoing organizational activities formed at least part of the respondent’s motivation for entering into what purported to be a collective agreement with the intervener on July 26, 1982, effective from April 25, 1982 until April 30, 1984.

13. Under the circumstances, the respondent’s support for the intervener and its “predecessor”, the Primo Workers’ Committee, clearly contravened section 64 of the Act which provides:

“No employer or employers’ organization and no person acting on behalf of an employer or an employers’ organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.”

The respondent not only intentionally supported the intervener and the committee that preceded it, but also thereby intentionally interfered with its employees’ selection of a trade union as their bargaining agent, contrary to section 64 of the Act. Thus, the applicant has established the first of the aforementioned three conditions which must be satisfied before certification can be granted under section 8 of the Act.

14. The second condition has also clearly been satisfied. During the organizing campaign which preceded this application, the union succeeded in signing 83 of the 182 unchallenged persons included in the bargaining unit for purposes of the count. (There are also an additional eight persons whose inclusion on the employer’s list has been challenged by the applicant on the ground that they exercise managerial functions within the meaning of section 1(3)(b) of the Act. Those challenges have not yet been resolved since the lengthy examination proceedings in respect of the duties and responsibilities of those eight persons have been halted, pending disposition of the applicant’s request for certification under section 8.) Thus, the union has the membership support of over 43 per cent of the employees in the bargaining unit (and may have the support of over 45 per cent, depending upon the outcome of its challenges). As indicated by the Board in *Skyline Hotels Limited*, [1980] OLRB Rep. Dec. 1811, at paragraph 63, what “membership support adequate for the purposes of collective bargaining” will mean in



terms of percentages must vary with the facts of each case, and no single catalogue of criteria can be laid down. One pertinent consideration is the stage at which the employer's contraventions of the Act occurred in the union's organizing drive. If the contraventions occurred at or near the beginning of the organizing campaign, the Board may be persuaded to find a certain level of support (such as 30 per cent in the *Skyline* case) to be adequate for purposes of collective bargaining even though that same level might not be found to be adequate where the contraventions did not occur until a point at which the campaign was close to being "spent". (For a summary of some of the other factors which have been considered by the Board in assessing the "adequacy" of the membership support enjoyed by a trade union, see *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848 at paragraph 21.)

15. In the present case, the respondent's contraventions of section 64 commenced prior to the union's most recent organizing campaign and continued throughout that campaign. Notwithstanding that illegal employer interference, the union succeeded in increasing its documented level of support among the employees from approximately 37 per cent (at the time of the vote in September of 1981) to over 43 per cent (as of July 28, 1982, the terminal date fixed for this application, and the date which the Board determines to be the time for the purpose of ascertaining membership under section 103(2)(j) of the Act). Thus, there is clearly a substantial and workable "core" from which the applicant can seek to muster additional support if it is granted the right to engage in collective bargaining with the respondent. Accordingly, having regard to all the circumstances, the Board is of the opinion that the applicant has membership support adequate for the purposes of collective bargaining.

16. It remains for the Board to determine whether the respondent's contraventions of the Act have resulted in a situation in which the true wishes of the employees are not likely to be ascertained, and, if so, whether the Board should exercise its discretion under section 8 to certify the applicant without a representation vote. In support of his client's application for certification pursuant to section 8, counsel for the union asked the Board to beware of becoming "jaundiced" by the "bad cases" which represent the "sewer of labour relations", and to look at section 8 in the context of this application and labour relations in the 1980's. He submitted that "the development of phony labour relations associations is a real blight on the labour relations landscape and a sophisticated threat to the labour movement".

17. In *Manor Cleaners Limited*, *supra*, the Board wrote as follows concerning the purpose of section 8 of the Act:

"The purpose of section 8 is aimed at redressing the rights of employees and their trade union when an employer has committed breaches of the Act so flagrant as to inhibit the ability of the employees to freely choose whether or not they wish to be represented by a trade union, be it by way of signing cards or by way of casting a ballot in a representation vote. (See *District of Algoma Home for the Aged (Algoma Manor)*, [1979] OLRB Rep. April 269; *Viceroy Construction Company, Limited*, [1977] OLRB Rep. Sept. 562; *Lorain Products (Canada) Ltd.*, [1977] OLRB Rep. Nov. 734). Normally a violation inhibiting employees' ability to choose is where

the job security of employees is threatened (see *Dylex Limited*, [1977] OLRB Rep. June 357; *Sommerville Belkin*, [1980] OLRB Rep. May 796; *A. Stork and Sons Ltd.*, [1981] OLRB Rep. Apr. 419; *Straton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801; *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. April 338). Section 8 was designed to eliminate a respondent's 'reward' for breaches of the Act which have resulted in a depressed membership evidence such that so few cards were signed either that certification without a vote cannot occur or that a vote never could have been ordered in the first place (see *Skyline Hotel Limited*, *supra*, at paragraphs 61 and 62). Section 8 is not intended to be a 'punishment' for the respondent (see *Radio Shack*, [1974] OLRB Rep. Dec. 1220), nor intended to allow an applicant to advance a campaign for members beyond its normal course (see *District of Algoma Home for the Aged*, *supra*).

As earlier noted by the Board in the *Skyline* case, *supra*, the competing policy considerations which underlie a provision such as section 8 were aptly described by the British Columbia Labour Relations Board in *International Brotherhood of Boilermakers, Lodge 359 and Forano Limited*, [1974] 1 Can LRBR 13, at page 20:

"....Certification without a vote ... creates a real disincentive to the use of [intimidatory] kinds of tactics. It does so by depriving the offender of the fruits of its unlawful conduct.... However, that is just part of the case for this remedy, because the party primarily affected by the certificate is the employees. We can assume that the Legislature did not want to visit the sins of the employer or the union on the innocent employees, who, after all, are supposed to be the beneficiaries of this freedom of choice about collective bargaining. Accordingly, the remedy is to be used where one cannot feasibly determine the true wishes of the employees through the normal means .... I think everyone is aware of the risks involved in that kind of certification. In some cases, the employees may have foisted upon them a bargaining representative which they really don't want. Undoubtedly, the remedy must be carefully used..."

18. The circumstances which have generally triggered the application of section 8 were reviewed as follows in *The Globe and Mail Division of Canadian Newspapers Company Limited*, [1982] OLRB Rep. Feb. 189:

"60. The Board has found in a number of cases that the employer, in violating the Act, made threats to the continued security of his employees conditional on whether the union succeeded in its attempt to become certified. In these cases, the Board concluded that the employer violation of the Act was such as to make it unlikely that the true wishes of the employees could be ascertained. An employee is unable to express his true wishes where he had been told by his employer, either expressly or impliedly, and had reason to believe, that the selection of a union may cause the company to reduce the scale of its operation or close down with an attendant reduction in

the number of jobs. (See *Dylex Limited*, *supra*, *Lorraine Products (Canada) Ltd.*, [1977] OLRB Rep. Nov. 734, *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. April 338, *Straton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801, *Somerville Belkin Industries Limited*, [1980] OLRB Rep. May 791 and *A. Stork and Sons Ltd.*, [1981] OLRB Rep. April 419.)

61. The Board has also applied the section where the cumulative effect of a range of unlawful employer activities, none of which taken separately might call the section into play, has the effect of undermining the confidence in the rule of law which a reasonable employee is presumed to have and which gives a reasonable employee the confidence to make a free choice. In these circumstances the Board is forced to the inevitable conclusion that the true wishes of the employees are not likely to be ascertained. (See *re Radio Shack*, *supra*, *K-Mart*, *supra*, *Skyline Hotels Limited*, *supra* and *Robin Hood Multi Foods*, [1981] OLRB Rep. July 972.)”

19. This is not the first case in which the Board has been asked to certify a trade union pursuant to section 8 where an employer has contravened section 64 of the Act by supporting an “in-house” employees’ organization in order to draw employee support away from that trade union. In *Homeware Industries Limited*, [1981] OLRB Rep. Feb. 164, the employer was found to have interfered with the selection of a trade union by employees contrary to section 64 [then section 56] of the Act, by “proposing the establishment of an employee committee where none had existed before, and then dealing with the committee with respect to working conditions, ... so as to draw employee support away from the applicant trade union and towards the committee”. In that case, as in the present case, the committee was permitted by management to conduct its affairs during working hours and to make use of company bulletin boards. In rejecting the trade union’s request for certification without a vote on the basis of the employer’s contravention of section 64 of the Act, the Board wrote:

“14. For a trade union to be certified under section 7a [now section 8], it is not sufficient that the Board conclude that the employer has contravened the Act. Rather, in a case such as this, the Board must also be satisfied that the true wishes of employees are not likely to be ascertained by way of a representation vote. In the instant case, the statements and actions of [management] would have made it clear to employees that the respondent did not desire to have its employees represented by a trade union and that the respondent would prefer to deal with its employees through an employee committee. However, the respondent’s preference in this regard is not likely to have come as a surprise to any reasonable employee. Employees do not expect employers to welcome the unionization of their work forces and a clear indication of this fact by an employer, standing by itself, is not likely to have an unduly coercing influence on employees.”

The Board concluded (at paragraph 15) that a remedial order to redress the employer’s breach of section 64 of the Act would enable the employees to express their true wishes in a representation vote:



"... When all of these considerations are taken into account, we feel that if the applicant trade union is given an opportunity to address employees during their working hours so as to provide it with an opportunity to counter the effect of the respondent's earlier interference with employee rights through its support for the employee committee, and with the posting of the attached notice, made an appendix of this decision, employees will in fact be able to express their wishes in a representation vote conducted by the Board."

The Board also directed the employer to "cease and desist from supporting an employee committee as a way of seeking to draw employee support away from the applicant trade union."

20. Similarly, in *Upper Canadian Furniture Limited*, [1981] OLRB Rep. July 1016, the Board was asked to grant a section 8 certificate where an employer, which was aware of a union organizational drive in respect of its employees, permitted various activities in relation to the formation of an employees' committee to take place on company premises during working hours, including the holding of a meeting of all employees and the posting of a notice on the company bulletin board. After reviewing the pertinent jurisprudence, the Board concluded that the employer's conduct constituted "interference in the free selection of a trade union" contrary to section 64 of the Act. However, it declined to grant a certificate to the union under section 8 of the Act because it was satisfied that the true wishes of the employees could be ascertained through a representation vote "taken following the imposition of substantial remedies designed to neutralize the impact of the employer's violation of the Act". To rectify the adverse impact of the employer's unfair labour practice, the Board ordered the following (at paragraph 49):

"(i) That the employer post copies of the attached notice marked 'Appendix' in both English and Portuguese as supplied by the Board in equal numbers, in conspicuous places on its premises, including commonly used bulletin boards, where it is likely to come to the attention of the employees; that the notices be posted until the conclusion of the representation vote ordered herein, that reasonable steps be taken to insure that the said notices are not altered or defaced or covered by any other material; that reasonable access be given by the respondent to a representative of the International Woodworkers of America so that the union can satisfy itself that this posting requirement is being complied with;

(ii) That at least two representatives of the union be given an opportunity forthwith, and before the taking of the representation vote, to hold a meeting of all employees, without loss of pay, on the company's premises during working hours, such meeting to be allowed a minimum time of one hour. The union may, if it so desires, bring a person to the meeting for the express purpose of translating for employees who speak Portuguese;

(iii) That the union be permitted reasonable access to the bulletin boards where notices to employees are regularly posted until the

imposition of the silent period preceding the representation vote ordered by the Board herein;

(iv) That the employer at its own expense send a copy of the Appendix in both English and Portuguese as supplied by the Board to the home address of each employee in the bargaining unit; and

(v) That a representation vote be held among the employees in the voting constituency. All notices concerning this vote are to be posted in both Portuguese and English as provided by the Board.”

21. In support of his argument that the true wishes of the respondent's employees are not likely to be ascertained, counsel for the applicant referred the Board to *Propair Inc.*, a Canada Labour Relations Board decision dated April 26, 1982, (C.L.R.B. File 565-156). That case arose out of a situation in which, following a sale of a business by an employer (“Fecteau”) whose employees were represented by a Teamsters local, and an intermingling of those employees with a smaller group of employees for whom an employees' association held bargaining rights, the C.L.R.B. directed that a vote be taken of all the intermingled employees to permit them to choose between the Teamsters and the association. A week and a half later the successor employer (“Propair”) entered into a collective agreement with the association in respect of all the intermingled employees. This prompted the Teamsters to ask the C.L.R.B. to rescind the vote order and declare the Teamsters to be the bargaining agent for all of the employees in question (pursuant to the *Canada Labour Code* equivalent of section 63(6) of the *Labour Relations Act*). In granting that request, the C.L.R.B. found that by negotiating a collective agreement with the association, the successor employer “clearly indicated to the employees where its preference lay” and interfered with the representation of its employees by a trade union. The Board also wrote (at pages 21 and 22 of its decision):

“Clearly, the fact that Propair and the Association have entered into a collective agreement will work to the Association's advantage because it can always impress upon the employees that it achieved something, whereas its rival did not even manage to bargain. As we stated earlier, we cannot blame the Association for entering into a collective agreement or criticize it for trying to gain the allegiance of the former Fecteau employees. The fact remains, however, that because of the favouritism showed by Propair, we are convinced that the vote announced on January 4, 1982, if held, could not reflect the freely expressed will of the employees affected. We are also convinced that the situation could not improve, even if we postponed the vote, because the collective agreement would still be uppermost in the minds of the employees.”

Thus, the Board concluded that it would be “impossible to hold a free vote” under the circumstances (and proceeded to certify the Teamsters since that union represented nearly seventy per cent of the intermingled employees).

22. The *Propair* case is distinguishable from the instant case in that the employees' association with which the successor employer entered into a collective agreement in that case was a bona fide trade union, which had earlier been certified to represent a unit of

employees that made up almost a third of the intermingled employees, and which was legally capable of entering into a valid collective agreement; it was not an employer supported entity like the intervener which has been found by the Board to be uncertifiable and incapable of entering into a collective agreement for purposes of the *Labour Relations Act*. In the *Propair* case, the representation vote which the C.L.R.B. had planned to conduct would have called upon employees to choose between the Teamsters and the association as their bargaining agent. In those circumstances, the fact that the association had succeeded in negotiating a collective agreement which could be immediately implemented if the association won the vote, while the Teamsters, on the other hand, had been unable to even persuade Propair to bargain with it, might indeed have made that collective agreement "uppermost in the minds of the employees". By way of contrast, a representation vote in the present case would not call upon the respondent's employees to choose between the applicant and the intervener, as we have found the intervener to be an employer supported organization which cannot be certified. Moreover, the "collective agreement" which the intervener purported to enter into with the respondent in July of 1982 would be quite unlikely to be "uppermost in the minds of employees" since that document was found not to be a collective agreement for the purposes of the Act in the aforementioned Board decision, of which many if not all of the employees were notified (in quite emphatic, non-legal terminology) by the applicant early in 1983. Further notice to the employees concerning the uncertifiability of the intervener and its incapacity to enter into a collective agreement for purposes of the *Labour Relations Act* will be provided by the Board notice which will be required to be posted in conspicuous places on the respondent's premises in connection with the representation vote.

23. We are also satisfied that any continuing adverse effects of the respondent's contraventions of the Act can be adequately remedied by directing the respondent to provide the applicant with access to plant bulletin boards and with access to its employees through a meeting held during working hours on company premises without loss of pay. Those remedies, which we find to be appropriate in the circumstances of this case to redress the respondent's unfair labour practices, will go a long way toward restoring the atmosphere which existed prior to the respondent's illegal conduct, and will also unequivocally demonstrate to the respondent's employees that this Board has the power to ensure that the labour relations "rule of law" is maintained in the workplace.

24. In declining to certify the applicant pursuant to section 8, we have also taken into account the fact that it is far from certain that the applicant would have achieved membership support in excess of 50 per cent. The applicant did succeed in raising its level of support from 37 per cent (as of September 10, 1981) to over 43 per cent (as of July 28, 1982), and we are satisfied on the balance of probabilities that, but for the chilling effect of the respondent's contraventions of section 64, the applicant would have achieved membership support of not less than 45 per cent (irrespective of the aforementioned challenges). However, it is evident that there are also a number of employees who have been opposed to the applicant since the onset of its initial organizational campaign in respect of the respondent, and that employee opposition to the applicant does not stem entirely from the respondent's illegal activities in the present case and in the applicant's previous certification application. Thus, the issuance of a section 8 certificate in the circumstances of the present case might have the unfortunate effect of foisting upon the employees in question a bargaining representative which a



majority of them do not want. Such result would be unfortunate not only for the employees and the respondent, but also for the applicant because, as observed in paragraph 62 of the *Skyline* case, *supra*, "where the support is not there, the Board is scarcely placing the trade union in an enviable position by sending it off with a certificate".

25. For the foregoing reasons, the Board hereby declares that the respondent has contravened section 64 of the Act. To rectify the adverse impact of the respondent's contraventions of the Act, the Board orders that the respondent:

(1) cease and desist from participating in the formation or administration of, and providing other support for, the intervener, the Primo Employees' Committee, or any other committee or association of employees;

(2) permit at least two representatives of the applicant to hold a meeting on the respondent's premises with all employees in the voting constituency, out of the presence of any member of management, during normal working hours forthwith, before the taking of the representation vote ordered by the Board herein, without loss of pay, such meeting to be a minimum of one hour in length;

(3) provide the applicant with reasonable access to bulletin boards where notices to employees are regularly posted, until the conclusion of the representation vote ordered by the Board herein; and

(4) post copies of the attached notice marked Appendix "B" in both English and Italian as supplied by the Board in equal numbers, in conspicuous places on its premises, including commonly used bulletin boards, where they are likely to come to the attention of the employees, and keep the notices posted until the conclusion of the representation vote ordered herein; that reasonable steps be taken by the respondent to ensure that the said notices are not altered, defaced or covered by any other material; and that the respondent give a representative of the applicant reasonable physical access to its premises so that the applicant can satisfy itself that this posting requirement is being complied with.

26. As indicated above, the parties are in agreement that if the Board declines to certify the applicant pursuant to section 8, the Board has jurisdiction in the circumstances of this case to direct that a representation vote be taken in order to determine whether or not the applicant is to be certified. Having regard to the agreement of the parties and the desirability of placing the applicant as nearly as possible in the position which it would have been in but for the respondent's contraventions of the Act, the Board directs that a representation vote be taken of the employees of the respondent in the following voting constituency:

All employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of

foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.

All notices concerning the representation vote are to be posted in both English and Italian, as provided by the Board.

27. All employees of the respondent in the voting constituency on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

28. The following persons whose employee status is challenged by the applicant (which contends that they exercise managerial functions) shall be permitted to cast segregated ballots in the representation vote:

Gaetano Barone  
Giacinto Calabria  
Teresa Corasanite  
Domenic Giambattista  
Peter Mingham  
Elecia Pace  
Antonio Palmisano  
Camilla Pasquini

29. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

30. The Board remains seized of this matter in the event that a dispute arises over the implementation or interpretation of the Board's order.

31. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. A majority decision on certain issues was released to the parties on or about December 24, 1982. On April 6, 1983 the Board reconvened the parties to hear further evidence and submissions. On that day I read to the parties my reasons for dissenting from the majority decision. Those comments were mainly directed toward certain allegations made by the applicant union against the professional conduct of counsel for the employer and the employer association, - allegations which have been dropped by the union in the continuation of the proceedings.

2. It seems to me that the Board is using an adversarial test when it examines the circumstances of this case. Furthermore it allows the applicant union a vested interest in the representation of the bargain unit, even when the applicant is not attempting to actively organize the plant.

3. According to the evidence the Primo Employees' Association is a trade union within the definition found in the *Labour Relations Act*. That finding is separate and quite distinct from the issue of whether or not it is entitled to be certified.

4. The applicant union lost a vote at the plant which wasn't even close. In those circumstances, to say that the employees cannot try to set up their own organization and bargain with their employer is to give the established applicant union a substantial advantage when it once again appears at the plant gate. To employees, it means that if you are going to set up your own union, you had better foster an adversarial relationship with your employer from the start. And, if an established trade union appears on the scene, the relationship you have fostered with your employer will be in jeopardy, if your approach to labour relations in any way differs from the concept accepted by this Board.

5. There is no property right to a bargaining unit, nor do established unions obtain a proprietary right to a unit before this Board. The intervener employees' association has status as a trade union and has a valid collective agreement with the employer. That collective agreement is a bar to this application and I would order it to be dismissed.

*[Appendix A omitted]*

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## Appendix "B"

### The Labour Relations Act

# NOTICE TO EMPLOYEES

## Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A SERIES OF HEARINGS IN WHICH WE, THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AND THE PRIMO EMPLOYEES' ASSOCIATION PARTICIPATED. IN A DECISION DATED DECEMBER 24, 1982, THE BOARD FOUND THAT THE APRIL 25, 1982 TO APRIL 30, 1984 AGREEMENT WHICH WE ENTERED INTO WITH THE ASSOCIATION IN JULY OF 1982 WAS NOT A COLLECTIVE AGREEMENT FOR THE PURPOSES OF THE LABOUR RELATIONS ACT, AND FURTHER FOUND THAT THE ASSOCIATION COULD NOT BE CERTIFIED, BECAUSE WE HAD PARTICIPATED IN ITS FORMATION OR ADMINISTRATION, AND CONTRIBUTED OTHER SUPPORT TO IT AND THE EMPLOYEES' COMMITTEE WHICH PRECEDED IT. IN THE SUBSEQUENT DECISION IN WHICH IT ORDERED US TO POST THIS NOTICE, THE BOARD FOUND THAT BY ENGAGING IN THOSE ACTIVITIES, WE CONTRAVENED SECTION 64 OF THE LABOUR RELATIONS ACT, BY INTENTIONALLY INTERFERING WITH OUR EMPLOYEES' FREE SELECTION OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;
- TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING,
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
- TO REFUSE TO DO ANY AND ALL OF THESE.

TO INSURE THAT A UNION WILL REFLECT EMPLOYEE WISHES, THE ACT REQUIRES THAT IT BE INDEPENDENT OF MANAGERIAL SUPPORT OR INFLUENCE. IF IT IS NOT, IT CANNOT BE CERTIFIED TO REPRESENT EMPLOYEES, AND CANNOT ENTER INTO A COLLECTIVE AGREEMENT FOR PURPOSES OF THE LABOUR RELATIONS ACT.

WE ASSURE ALL OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THE RIGHTS LISTED ABOVE.

WE WILL NOT ENGAGE IN ANY CONDUCT WHICH INTERFERES WITH THE EMPLOYEES' FREE SELECTION, ORGANIZATION OR ADMINISTRATION OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION.

WE WILL NOT PARTICIPATE IN THE FORMATION OR ADMINISTRATION OF ANY EMPLOYEES' ASSOCIATION OR COMMITTEE IN CONTRAVENTION OF THE ACT.

WE WILL PERMIT THE UNION TO HOLD A MEETING WITH ALL EMPLOYEES IN THE VOTING CONSTITUENCY, WITHOUT LOSS OF PAY, ON COMPANY PREMISES AND DURING WORKING HOURS, AS ORDERED BY THE BOARD.

WE WILL PERMIT THE UNION REASONABLE ACCESS TO THE BULLETIN BOARDS COMMONLY USED TO POST MESSAGES TO EMPLOYEES, UNTIL THE CONCLUSION OF THE REPRESENTATION VOTE ORDERED BY THE BOARD.

WE WILL ALLOW THE EMPLOYEES THROUGH THE TAKING OF A REPRESENTATION VOTE ORDERED BY THE BOARD TO FREELY DECIDE WHETHER OR NOT THEY WISH TO BE REPRESENTED BY THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION.

IF THE MAJORITY OF EMPLOYEES VOTE IN FAVOUR OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AND THE BOARD CERTIFIES THE UNION AS THE EMPLOYEES' REPRESENTATIVE, WE WILL BARGAIN IN GOOD FAITH WITH THE UNION AND MAKE EVERY REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT.

PRIMO IMPORTING AND DISTRIBUTING CO. LTD.

PER: (AUTHORIZED REPRESENTATIVE)

**This is an official notice of the Board and must not be removed or defaced.**

THIS NOTICE MUST REMAIN POSTED UNTIL THE CONCLUSION OF THE REPRESENTATION VOTE ORDERED BY THE BOARD

DATED this 28th day of JUNE, 1983.

**1166-82-U Mrs. Odete Fonseca and Others, Complainants, v. Rollstamp Manufacturing Ltd., Respondent**

**Discharge for Union Activity - Interference in Trade Unions - Unfair Labour Practice - Union supporters laid-off - Whether for business reasons - Whether anti-union employees transferred to avoid lay-off - Board finding no breach**

**BEFORE:** G. Gail Brent, Vice-Chairman and Board Members M. Eayrs and B. L. Armstrong.

*Appearances:* Maria Rodrigues for the complainant; E. L. Stringer, Q.C., H. Huber and J. Hofmann for the respondent.

**DECISION OF THE BOARD;** June 16, 1983

1. The complainants have complained that they were dealt with by the respondent contrary to sections 66 and 70 of the *Labour Relations Act*. The essence of the complaint is that they allege that they were indefinitely laid off effective July 9, 1982 because they were union supporters.

2. There are three separate categories into which the evidence can be organized in order to examine the allegations. They are: (A) the business conditions which prevailed at the time of the layoff; (B) the union organizing activity and the history of litigation arising therefrom; and (C) the complainants' evidence regarding the effect of (B) on their being laid off. We believe that examining the evidence under these three categories will allow the evidence to be put in the proper perspective.

(A) Business Conditions at the Time of the Layoff

3. There was no dispute on this evidence. The respondent is engaged in the business of doing press and assembly work of automobile parts which it supplies to the major North American automobile makers. It is a wholly owned subsidiary of Magna International. Four of the parts which it was making and assembling were for the grill of the General Motors (hereinafter G.M.) 1/2 ton light pickup truck. Those parts were being made under contract with G.M., and the respondent was required to bid on the job every time there was a change in the moldings. These quotes were requested by G.M. at the relevant times. In September or October, 1981, after such a request, G.M. informed the respondent that its quote was too high. The respondent submitted another quote lowering its price; however, G.M. still considered the price to be too high and awarded the contract to a manufacturer located in the United States, near Detroit. That manufacturer has no connection with either the respondent or its parent company. Since new car production started in August, the respondent's contract with G.M. was finished in July, 1982.

4. On or about June 25, 1982 Mr. Huber, the respondent's general manager, told all of the assemblers that they would be laid off. This was followed by a letter (Exhibit #2) which informed them that the respondent had lost the G.M. grill work and had been unable to find any other assembly work to replace it. All of the complainants were assemblers. There were twenty-three assemblers employed by the respondent at that time



and all of them were laid off. Only two of the assemblers, none of whom were complainants, were employed assembling another part – small anodized clips for the Chrysler Cordoba produced by another manufacturer. Those two assemblers were also laid off.

5. At the same June 25th meeting Mr. Huber also told the press operators that, because of the poor business conditions, their hours would be reduced from forty-eight to forty hours per week. He also said that he hoped that there would not have to be any further layoffs. None of the complainants were press operators and there was no evidence that any of them could operate the press.

6. The respondent's evidence was also that in January or February, 1982 it had laid off approximately nine people who were employed on the Escort and Lynx windshield assembly. These layoffs flowed from the decision of the respondent to allow the anodizer, Friedel Manufacturing, to do the assembly work in order to meet quality control concerns. At the request of Friedel, the respondent supplied those employees with directions about how to find Friedel, which was interested in hiring them to do the work. Those employees were subsequently hired by Friedel. At that time Friedel had no corporate connection with the respondent. In August, 1982 Friedel was purchased by the respondent's parent company, Magna. The respondent testified that it could not offer the same opportunity to the twenty-three assemblers laid off in July because it had completely lost the G.M. contract.

7. The respondent's evidence was that since July, 1982 it had hired no new assemblers to replace those laid off. Mr. Huber also said that in 1981, at its peak, the respondent employed one hundred and twenty-five employees. He said that in September, 1982, when the complaint was filed, there were sixty-eight employees. Aside from the nine laid off in January or February, 1982 and the twenty-three employees laid off in July, 1982, the respondent has also lost a fair number of employees, whom it did not replace, through attrition. Mr. Huber testified that once it was clear that the G.M. contract was being lost no new employees were hired to replace those who quit. Mr. Huber said that he would recall the employees laid off if he had work for them.

(B) History of Union Activity and Litigation Arising Therefrom

8. There is no doubt that Mrs. Fonseca, one of the complainants, was the chief organizer for the union, the United Electrical Workers, in its campaign to be certified as bargaining agent for the respondent's employees. There is also no doubt that the respondent knew of Mrs. Fonseca's involvement well before the layoff in July, 1982.

9. In June, 1981 the United Electrical Workers applied for certification for a single bargaining unit which included the employees of the respondent and those of two other divisions of Magna. The Board determined that this was not an appropriate bargaining unit, and, what is relevant for our purposes, decided that the respondent's employees would constitute a separate bargaining unit. The Board also decided that there was insufficient evidence of membership to certify the union for the respondent's employees and dismissed that aspect of the application. Shortly thereafter the union applied for certification as the bargaining agent for the respondent's employees. A pre-hearing vote

was held in October, 1981. The union made allegations against the respondent in a letter dated October 26, 1981, and the Board proceeded to hear those allegations on November 25, 1981. The hearing commenced that day but did not conclude. Between the first day of hearing and the date set for the continuation the union notified the Board, on December 28, 1981, that it was discontinuing its action and that the vote could be counted. The vote was counted in January, 1982 and the Board's decision of January 19, 1982 indicated that the union lost the vote.

10. It would appear that there was a group of petitioners who opposed certification and who appeared at the hearing with its own lawyer. The union's allegations against the respondent did not include employer involvement in the petition.

11. There have been no applications for certification made since that time, and there is no evidence to suggest that there has been any union organizing activity in the plant since then.

12. The union is not a party to these proceedings.

(C) The Complainants' Position Regarding the Connection between their Union Activity and the Layoff

13. All of the complainants who testified were union supporters and suggested that there was an attempt on the part of the respondent to save the jobs of five employees who were opposed to the union by transferring them from assembly to the press shortly before the layoff. The respondent's evidence was that it had never done that, and that it did not allow assemblers to bump into the press operator classification. Mr. Huber said that the press operator classification is more skilled than the assembler classification and carries a higher rate. Mr. Huber did say that in August, 1980 four assemblers were transferred to become press operators on the Lynx and Escort job, which was a newly acquired job. One of those four was C. Nunnes, who was mentioned by the complainants as one of those transferred to avoid being laid off.

14. Along with C. Nunnes the complainants alleged that Guimar Camara, an employee named Jesuina, Mr. F. Silva, and L. Leal were all transferred so that they would not be laid off. The complainants were firm in their assertion that this occurred shortly before the layoff, but much of their evidence about dates was sketchy. Ms. Da Costa testified that she used to work unwrapping parts but was transferred to assembly. Two employees she could only identify as Alzira and Guimar, both of whom had more seniority than she did then, began to do the unwrapping work. It would appear from her evidence that this transfer occurred in March, 1982 after she had injured her finger, and that Alzira, at least, like Ms. Da Costa, was not a press operator. Ms. Carvalho once worked at the press machines but was unable to say whether or not she was a press operator. She testified that she had surgery in May, 1981 and had returned to work on July 26, 1981. She said that at that time she was put on assembly and that sometime during her absence Jesuina had been moved to the presses to do her former job. Ms. Muniz could not recall when any of the five were moved from assembly because "they were working there a long time", maybe two or three months before the layoff. She also said that C. Nunnes was moved first, then Jesuina, and the other three later. Ms. Pereira did not testify about the transfer.

15. All of the complainants testified about activities which occurred at or around the time of the certification applications and the votes. They described heated exchanges between pro and anti-union groups; they described the conduct of the respondent's bus driver in failing to pick up Ms. Fonseca; and they described other conduct in connection with the bus. All of the conduct described was so described with the suggestion that the respondent was the guiding and planning force behind these actions. In assessing this evidence it cannot be forgotten that the union chose not to pursue its allegations of anti-union conduct against the respondent.

16. The only witness who described anything that was said to her around the time of the layoff was Ms. Da Costa. She said that one of her fellow employees said to her that it was right that they were being laid off because they were stupid. She also said that two days before she received notice of layoff one of the employees asked her when she was moving. Ms. Da Costa said that she did not know what to make of that remark at the time, but later decided that the employee was making fun of her and knew that she was about to be laid off. Neither of these remarks was made by a "boss".

17. There was considerable dispute about the amount of assembly work and overtime being done at the plant. The respondent's evidence, briefly summarized, was that there was overtime done up to July 9th so that the G.M. parts could be shipped before the contract ended. It was also the respondent's evidence that any assembly work being done after July, 1982 had been done by some press operators on light duties on a couple of Fridays to supply replacement parts. The respondent said there has been no overtime since July 9th. The complainants said that they had heard from some employees still at work that there was overtime worked in August.

### Conclusions

18. It is undeniably the right of the employees to choose to be represented by a union. This right cannot be interfered with by an employer, and an employer cannot discriminate against employees on the basis of their union involvement. It is the duty of this Board to scrutinize the respondent's actions to determine whether the decision to lay off these employees was influenced in any way by their union involvement.

19. There is no evidence to contradict the respondent's evidence about the loss of the G.M. contract and the effect that had on the respondent's business. There is undeniably a casual connection between the loss of the assembly work and the decision to close down the assembly line and to lay off the assemblers. There is no evidence to support any conclusion that the respondent was in any way connected with the company which successfully outbid it or that it purposely set out to lose the contract as a pretext for closing down its assembly operation.

20. The earliest the respondent knew that it was facing difficulties retaining the G.M. contract was in September or October, 1981. The allegation that the respondent purposely transferred five anti-union assemblers to the press operation must be examined in light of that date. There is no evidence to contradict Mr. Huber's evidence that C. Nunnes was moved to the press in August, 1980 - approximately one year before the respondent was in danger of losing the G.M. work. Assuming that the complainants' evidence is correct, there is no evidence to suggest that the five people who were



identified were moved from assembly in a group. The evidence suggests that the second of the group of five to move was Jesuina, and that this occurred sometime between May and July, 1981. Again, this was before the respondent knew that the G.M. contract would be lost. Not only that, but the move seemed to be connected with Ms. Carvalho's absence from work for surgery, and there is no evidence to the effect that Ms. Carvahlo either asked for or was able to do her former job after her return to work. There is also no evidence to suggest that she was denied her former job after requesting it back. The next move appears to have occurred sometime in March, 1982 and involved two employees identified as Alzira and Guimar. Assuming that Guimar is Guimar Camara, one of the five identified, then we are left with the fact that Alzira is not one of the group of five. This move occurred after the respondent knew that the G.M. contract was going to be lost but it also involved the transfer of someone other than one of the five identified. There is also some suggestion that the move may have been connected somehow with Ms. Da Costa's injured finger. The most we know about the other two is that they were moved some months before the layoff.

21. Given the different times when the moves were made, it is unlikely that there existed any organized plan to transfer anti-union employees to another job to save their jobs in the face of the impending layoff. There is no such pattern which emerges as probable from the evidence. Moreover, any inference concerning such a plan that can be drawn from the evidence is severely strained when it is seen that at least two of the five were transferred well before the respondent knew that it had lost the G.M. contract and could find no assembly work to replace it. Therefore, we cannot conclude that the respondent purposely set about to protect anti-union employees from the impending layoff.

22. There is no evidence concerning any anti-union activity after the time of the vote in October, 1981. Assuming, for the sake of argument, that the respondent was responsible for that 1981 activity, we are still faced with the problem of tracing a link between what occurred in and around October, 1981 and the layoff in July, 1982. This is made all the more difficult, if not impossible, by the fact that the union dropped the allegations of unfair labour practice made in connection with those very activities on which the complainants rely. Given that the union did not pursue those allegations in 1981, we are left with two possible inferences: either there was no basis in fact for the allegations or the union did not serve its supporters' interests properly. If the former is the case, then there is no basis for concluding that there was any anti-union animus on the respondent's part. If the latter is the case, then there is still the problem of the remoteness between those actions during the organizing campaign and the layoff. There is just nothing to suggest any anti-union actions once the result of the vote was known, and there is certainly no evidence, outside of the layoff itself, to the effect that any of the complainants suffered any discrimination because of their support for the union during the period between October, 1981 and July, 1982. Moreover, there is credible, undisputed evidence concerning the respondent's loss of the job which the assemblers were doing and of the consequences that had both on its business and also on the number and type of employees it required after July, 1982. Given that evidence coupled with the facts (a) that the union chose not to pursue its allegations concerning the respondent's October 1981 behaviour, leaving us with the inference that there was no wrongdoing by the respondent, and (b) that there was no cogent evidence of any anti-union activities by the respondent between October, 1981 and July, 1982, we must conclude that the respondent

has met its obligation under the Act and has satisfied the burden of proving, on balance, that the layoffs were not motivated by any anti-union animus.

23. For all of the reasons set out above, the complaint is dismissed. The complainants did a fine job of representing themselves at this hearing. It would certainly appear that they do not agree with the union's decision to drop the charges made against the respondent in October, 1981. That may really be the heart of the matter before us. For their sake, one must accept that the union's decision was based on an assessment of the situation which led to the conclusion that the allegations were without substance. To do otherwise would be a sad comment indeed on the way the union treated the trust which these complainants placed in it. We have no basis for concluding that the union betrayed that trust. The complainants must therefore accept, no matter how reluctantly, that their employment was not jeopardized by the exercise of their right to join a union.

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**0039-83-R** Royal Ontario Museum Curatorial Association, Applicant, v. **The Royal Ontario Museum**, Respondent, v. Ontario Public Service Employees Union, Intervener

**Natural Justice - Practice and Procedure - Officer appointed to inquire into duties and responsibilities - Counsel alleging officer biased and requesting another officer - Seeking hearing to establish allegation - Officers' role to produce verbatim transcript of evidence - No input into Board decisions - Request denied**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members W. Gibson and C. Ballentine.

# **DECISION OF THE BOARD;** June 20, 1983

1. The Board, differently constituted, issued a decision May 2nd, 1983 in which a Board Officer was appointed to inquire into the duties and responsibilities of certain persons whom the respondent claims exercise managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act*. An Officer was appointed for this purpose and has been conducting an examination into the duties and responsibilities of those persons. In a letter dated June 17th, 1983 from counsel for the respondent, counsel seeks to have another Officer substituted because of a perceived bias contrary to the interests of the respondent. Counsel has also requested an opportunity to lead evidence before the Board to establish the allegation of bias. This is an interim decision dealing with the allegation and the request for a hearing before the Board.

2. A Board Officer appointed by the Board to inquire into and report to the Board on the duties and responsibilities of employees makes no findings of fact or law. The Officer's function is to examine the persons at issue and to allow full opportunity to the parties to cross-examine these persons and to allow the parties to call their own witnesses

to be examined and cross-examined by the parties. The Officer makes a verbatim report of the evidence from these examinations and files it with the Board. That report is a verbatim transcript of the evidence and nothing more. The Officer makes no recommendations to the Board with respect to the disposition of the issues into which the examination was conducted.

3. The parties are given the opportunity to make full submissions to the Board on the accuracy of the report and/or the conclusions to be reached by the Board on the basis of the facts contained in the report. It is the panel of the Board which is assigned to receive those submissions, and not the Board Officer, which will make all decisions affecting the parties.

4. Even were the Board to accept, and it does not, that the Board Officer in this case is in some way biased against the interests of the respondent, there is nothing in counsel's submissions to suggest that the evidence which will appear in the transcript which forms the Officer's report in any way has been affected by the alleged bias.

5. Having regard for all of the foregoing, the Board is not prepared to convene a hearing into the respondent's allegations in this regard. Accordingly, the Board Officer is directed to continue the examination on the dates and at the times scheduled for it.

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**0387-83-R Sault Ste. Marie Typographical Union, Local 746, Applicant, v. The Sault Star, A Division of Southam Inc., Respondent**

**Bargaining Unit - Parties agreeing upon departmental unit in printing industry - Board not finding concerns expressed in *The Spectator* case - Finding agreed upon unit appropriate**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members S. Cooke and J. Wilson.

**APPEARANCES:** *M. Cornish, R. Earles and Linda Richardson Groff for the applicant; J. C. Murray and Richard Brideaux for the respondent.*

**DECISION OF THE BOARD;** June 21, 1983

1. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

2. At the hearing the applicant informed the Board that it was seeking certification with respect to a bargaining unit as described by the respondent. This bargaining unit is described as:

All employees in the Circulation Department and the Mailing Room of the Respondent at Sault Ste. Marie, save and except, Assistant Circulation Manager, Mail Room Foreman, persons above the rank of Assistant Circulation Manager, and Mail Room Foreman, persons



regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements.

3. There are presently four bargaining units at the newspaper in Sault Ste. Marie. The Pressmen's Union for many years has represented employees in the printing department. The applicant has represented some twenty-three employees in the composing room for several years. Since 1980, the applicant has represented twenty-five employees in the respondent's editorial unit and two collective agreements have been concluded. In 1980, the applicant was also certified to represent a bargaining unit containing three proofreaders.

4. At the present time there are two groups of employees of the respondent who are not represented in collective bargaining. One group is defined in the proposed bargaining unit set forth in paragraph two. This group consists of approximately twenty employees. The other group of employees number twenty-six, with six employees in the business office and twenty employees in the advertising and sales office. At the present time no trade union is seeking to represent the second group in collective bargaining. There is no interchange of employees between these two groups and the line of progression has not traditionally been from one group to the other. The business office, the advertising office and the circulation department each have their own manager. These managers report directly to the publisher. Both parties expressed satisfaction with the viability and workability of the proposed bargaining unit.

5. In *The Spectator, A Division of Southam Inc.*, [1981] OLRB Rep. Aug. 1177, the Board was confronted with a disagreement as to the description of a unit of part-time drivers. At pages 1178 and 1179, the Board stated its approach to bargaining units in the newspaper industry as follows:

8. In the instant case the parties were unable to refer the Board to any precedent decisions in which the practice of permitting departmental bargaining units in the newspaper industry was fully explained. A review of the Board's prior decisions suggests that the practice has evolved more as a matter of deferring to the agreement of the parties in the industry, an obviously critical consideration, rather than by the application of normative collective bargaining principles in disputed cases. If in the past the Board has acceded to agreements establishing the non-craft departmental units in the newspaper industry, it has not done so without some guarded concern. In the *St. Catharines Standard Limited*, [1975] OLRB Rep. July 601, the Board granted certification for all employees in the classified advertising department of the employer newspaper. In so doing it commented, at page 603, as follows:

In accepting the agreement of the parties, we wish to state that although the Board does not normally grant departmental units, such units have been recognized as appropriate in the newspaper publishing industry: see, for example, *Telegram Publishing Company Limited*, 59 CLLC ¶18,126; *Globe & Mail Limited*, 63

CLLC ¶16,290, where Circulation Department units were held to be appropriate. Moreover, it is presumed that the parties themselves know how their collective bargaining relationship can best be structured. Therefore, unless the agreed unit is patently irrational or unworkable – for example, if the grouping has no functional or organizational coherence, or if it excludes persons without convincing justification – the Board will normally accede to the wishes of the parties.

9. The foregoing passage indicates the Board's concern for the excessive fragmentation of bargaining units while recognizing the countervailing value of giving the greatest weight to the agreement of the parties in the structuring of bargaining units. Implicit in that statement, however, is an indication that where there is no agreement between the parties on the structure of a bargaining unit in the newspaper industry the Board will not hesitate to apply established general principles respecting community of interest in fashioning appropriate bargaining units. This is the first application in the newspaper industry which we are aware in which the parties have not been agreed on the designation of the bargaining unit. To that extent the Board is compelled to address the question of whether non-craft departmental units should be the presumed rule in the newspaper and printing industry or whether collective bargaining could be appropriately grounded on a more comprehensive basis.

6. The key to *The Spectator, A Division of Southam Inc.* is the disagreement of the parties over the appropriate bargaining unit. In the instant application the parties are in agreement with respect to a proposed departmental bargaining unit. Such agreements between employers and trade unions in the newspaper industry have historically been very much the rule rather than the exception. The Board has generally acceded to the wishes of employers and trade unions and has been content to determine appropriate bargaining units in accordance with their wishes. On the whole, this approach has worked tolerably well with comparatively few jurisdictional disputes in the newspaper industry in Ontario. While such jurisdictional disputes have been increasing recently, these disputes, for the most part, have their origins in new technology rather than in the descriptions of the bargaining units.

7. Since *The Spectator, A Division of Southam Inc.*, the Board has sought to apply and balance the principles of that decision. See, for example, *Peterborough Examiner*, [1982] OLRB Rep. March 432; and *Welland Evening Tribune*, [1982] OLRB Rep. March 513 and [1982] OLRB Rep. April 648. In *Kingston Whig Standard Co. Ltd.* (Board File No. 0210-83-R, decision dated May 24, 1983), the Board, on the agreement of the parties, determined that bargaining units in the news and editorial department and the mailing room department were appropriate for collective bargaining and issued certificates to a local of the International Typographical Union.

8. In the instant application, it appears that the majority of the respondent's employees are represented in collective bargaining and that to issue a certificate for the proposed bargaining unit would not cause any of the concerns expressed by the Board in

*The Spectator, A Division of Southam Inc., supra.* The alternative would be to appoint a Labour Relations Officer, with the attendant delay and expense to the parties, and with no indication that the appropriate bargaining unit would be any different from the presently proposed bargaining unit. The representations of the parties on the history of collective bargaining at the newspaper do not indicate that the present arrangement of bargaining rights is unworkable or that the addition of collective bargaining with respect to the proposed bargaining unit would change the existing situation.

9. In all of the circumstances of this application, the Board finds no reason to disregard the agreement of the parties. Having regard to the agreement of the parties, the Board further finds that all employees in the Circulation Department and the Mailing Room of the respondent at Sault Ste. Marie, save and except assistant circulation manager, mail room foreman, persons above the rank of assistant circulation manager and mail room foreman, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 1, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant.

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**0448-83-R** Canadian Union of Operating Engineers and General Workers, Applicant, v. The Sisters of St. Joseph of the Diocese of London in Ontario operating **St. Joseph Hospital at Sarnia, Ontario**, Respondent

**Bargaining Unit - Union and employer agreed upon "departmental" unit in hospital - Board not departing from policy of finding broader service unit appropriate - Agreed upon unit denied**

**BEFORE:** Corinne F. Murray, Vice-Chairman, and Board Members J. A. Ronson and H. Kobryn.

***APPEARANCES:** Ken Myles for the applicant; D. J. McNamara and P. J. Dusten for the respondent.*

**DECISION OF THE BOARD;** June 23, 1983

1. This is an application for certification wherein the applicant sought to be certified as bargaining agent for all persons presently employed in the maintenance department of the respondent, save and except chief engineer. The proposed bargaining unit includes 9 employees whose classifications are carpenter, painter, maintenance helper, electrician, maintenance mechanic, maintenance co-ordinator. Notwithstanding the agreement of the respondent to the certification of this type of unit (differently described), the Board invited argument from the applicant as to why the Board's normal policy against "departmental" certification and in favour of a larger "service" employee unit should not be followed.

2. It is undisputed that the only group certified at the respondent is a bargaining unit of stationary engineers and/or maintenance engineers. The bargaining agent is the applicant. If the remaining service, non-medical unit were to be described in the Board's normal fashion, the number of employees would be somewhere in the order of 120 employees. The normal description of the appropriate service unit is:

All employees of ... save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, social workers, social work assistants, persons engaged in research work, technical personnel (including in this exception, graduate and undergraduate: audiologists, physio-, occupational, psychiatric and speech therapists, psychologists, psychometrists, computer programmers, biomedical repair technicians, certified and non-certified dental assistants, photography technicians and artists-medical illustrators, registered, non-registered and student: laboratory technicians, X-ray technicians, respiratory technicians, electrocardiogram technicians, electroencephalogram technicians, pulmonary technicians, nuclear medicine technicians, ophthalmic technicians and laboratory assistants) supervisors, persons above the rank of supervisor, foremen, persons above the rank of foreman, chief engineer, office and clerical staff (including in this exception: ward clerks, admitting clerks, receptionists, safety and security officers, information clerks, mail clerks, cashiers,

librarians and switchboard operators), security guards, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

3. The applicant argued that it was bargaining agent for one unit similar to that applied for here. This is in a hospital in Windsor. Aside from this one instance, the type of workers encompassed within this application and represented by the applicant at other locations in Ontario fall into a unit of operating engineers and maintenance engineers. The respondent indicated that in other hospitals in Ontario other bargaining agents represented these type of workers who were part of a larger unit which included dietary staff, housekeeping staff, registered nursing assistants. This is reflective of the Board's normal policy as stated above.

4. The Board has maintained a policy that unnecessary fragmentation of the work place is to be avoided. The necessity of or lack of necessity of fragmentation turns on an assessment of the community of interest between groups of employees. The decisions are legion where the Board has determined the appropriate line to be drawn between bargaining units based upon an assessment of the community of interest. All of these decisions aim at setting out policies which encourage harmonious labour relations both on the long and short run. Over the years experience has taught us that harmony is most encouraged insofar as the hospital sector is concerned by drawing a large service unit, as set out above. There is nothing which the applicant has said which has convinced the Board this policy should not be followed in this case.

5. The applicant agreed that should the Board determine that the broader "service" unit was appropriate, its application for certification would fail. On that basis the Board dismisses the application.

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**0377-83-M; 0378-83-M** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Applicant, v. **Standard Insulation Limited**, Respondent

**Construction Industry Grievance - Practice and Procedure - Two witnesses sub-poenaed by union not appearing - Board reviewing authority to issue warrants for arrest - Warrants issued**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members J. Murray and W. F. Rutherford.

*APPEARANCES: B. Fishbein, J. Dewit and A. Taggart for the applicant; no one appeared for the respondent.*

**DECISION OF THE BOARD; June 21, 1983**

1. The Board directs that the above applications be and the same are hereby consolidated.

2. These are applications under section 124 of the *Labour Relations Act* in which the applicant union alleges that the respondent employer has failed to comply with the collective agreement to which they are bound.

3. The Board convened the hearing at its scheduled start time. However, although served with proper notice of the time and place of hearing, no one appeared for the respondent. The applicant advised the Board that it had subpoenaed two of the principals of the respondent company. The Board adjourned for approximately one hour but no one appeared for the respondent. The Board, therefore, proceeded in the absence of the respondent.

4. The applicant advised the Board that it would require the evidence of the two subpoenaed witnesses who had not appeared to establish its claim. The applicant asked the Board to issue warrants for the arrest of the two witnesses. The Board asked the applicant to satisfy it that these two persons had been properly served, whereupon the applicant produced affidavits signed by the process server. The Board is satisfied on this evidence that both Freddie L. Pilgrim and Paul Mitchell were properly served with summons to appear at the hearing in this matter and were paid the required conduct money.

5. The authority of the Board to issue the relief which the applicant union requests is based upon section 103(2)(a) of the *Labour Relations Act* which reads as follows:

(2) Without limiting the generality of subsection (1), the Board has the power,

(a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the Board considers requisite to the full investigation and consideration of matters



within its jurisdiction in the same manner as a court of record in civil cases

See also sections 124(3) and 44(8).

The Board's power to issue a bench warrant pursuant to those sections was discussed in *Casabil Contractor Limited*, [1980] OLRB Rep. Sept. 1278 which, as in the present case, involved an application under section 124 (then section 112(a)) of the Act. At pages 1278-1279 the Board commented:

3. In proceedings under section 112a, the Board, by virtue of sections 92(2)(a), 112a(3) and 37(7) of *The Labour Relations Act*, has the power to "... summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath ... in the same manner as a court of record in civil cases." The Board is acting as an arbitrator when dealing with matters under section 112a of the Act. The enforcement mechanisms contained in sections 12 and 13 of *The Statutory Powers Procedure Act* are unavailable to the Board in these proceedings because *The Statutory Powers Procedure Act* does not apply to arbitrators under *The Labour Relations Act*. (See section 3(2)(d) of *The Statutory Powers Procedure Act*, and *Re: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95* (1979), 25 O.R. (2d) 8). Thus, the enforcement of the Board's process is left entirely to the Board acting under the authority conferred upon it by *The Labour Relations Act*.

4. The Court in *Re: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95*, *supra*, stated at page 13:

... the purpose of the proceedings under s. 112a was to provide a speedy process for resolving disputes arising out of the interpretation of collective agreements negotiated in the construction industry. It is unnecessary for us to answer the question raised before us as to the appropriate procedures to be followed by the Board under s. 112a with respect to the issue of summonses or subpoenas and the enforcement therefor, but we are satisfied that the Act itself provides a method of enforcing the attendance of witnesses and the production of documents that could be applied with much greater speed in the case of a witness like Bittenbinder than is involved in an application by way of stated case to this Court under s. 13 of the *Statutory Powers Procedure Act*, 1971.

The Board is given the authority under the Act to enforce the attendance of a witness in the same manner as a court of record in civil cases. In Ontario, a court of record in civil cases has the authority to issue a warrant for the arrest of a person who has been duly served with a summons but has failed to appear. (See 26 C.E.D. (Ont. 3rd) 114-366, paragraph 673; Rule 275, Supreme Court of

Ontario Rules of Practice.) The issuing of a warrant directed to the Sheriff to bring a person before the Board is to be distinguished from punishing a person for contempt committed in the face of the Board. The Board, in issuing such a warrant is not punishing the witness for failing to attend. Indeed, it is our view that we cannot impose punishment for such action. (See *Re: Hawkins and Halifax County Residential Tenancies Board*, (1974), 47 D.L.R. (3d) 117 (N.S.S.C.).) Rather, it is ensuring that the witness attend before the Board to give evidence pursuant to a summons duly issued and served. However, should a witness refuse to testify after having been brought before the Board and after being directed by the Board to testify, such refusal may well constitute grounds for punishment by way of fine or imprisonment for contempt committed in the face of the Board. (See *Re: Diamond and Ontario Municipal Board*, [1962] O.R. 328; 32 D.L.R. (2d) 103.)

5. The Board may, therefore, enforce the attendance of a witness duly served with a summons and conduct money by issuing a warrant directing the Sheriff to arrest the witness and bring him before the Board if the party seeking such an order can establish that the witness was properly served with a summons and sufficient conduct money and that the presence of the witness is material to the ends of justice.

(See also *Mar-ot Painting Contractors Limited* [1982] OLRB Rep. July 1025).

6. The Board is satisfied that Freddie L. Pilgrim and Paul Mitchell have been properly served with a subpoena and conduct money requiring their attendance before the Board and have failed to appear. The Board is further satisfied that the presence of Freddie L. Pilgrim and Paul Mitchell is material to the ends of justice. Accordingly, pursuant to its authority under the *Labour Relations Act*, the Board hereby issues warrants for the arrest of Freddie L. Pilgrim and Paul Mitchell directed to the sheriffs and other peace officers in the Province of Ontario to arrest and bring Freddie L. Pilgrim and Paul Mitchell before the Board at the continuation of hearing in this matter on Tuesday, July 12, 1983 at the Royal Connaught Hotel, 112 King Street East, Hamilton, Ontario, commencing at 9:30 a.m.

7. The hearing in this matter is adjourned to July 12, 1983.

[Two warrants for arrest of defaulting witness omitted]

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**0471-82-R; 0436-82-U; 0511-82-U; 1279-82-U** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Applicant/Complainant, v. **Wilco-Canada Inc.**, Respondent

Certification Where Act Contravened - Damages - Discharge for Union Activity - Evidence - Interference in Trade Unions - Practice and Procedure - Remedies - Unfair Labour Practice - Counsel's request to prohibit publication of evidence denied - Tape recording of captive audience speech admitted in evidence - Discharge of union organizers not justified by plant rule prohibiting all solicitation on company premises - Whether lay-offs motivated by legitimate business reasons - Discharged employees breaching duty to mitigate damages by refusing employer's offer of reinstatement pending Board decision - Union certified without vote with supportive remedial directions

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members W. J. Brady and H. Kobryn.

**APPEARANCES:** *L. A. MacLean, Q. C., Clare Meneghini and M. Boyle for the applicant complainant; R. C. Filion, T. Sutcliffe and G. R. Wilson for the respondent.*

**DECISION OF THE BOARD;** June 3, 1983

1. The matters before the Board in these consolidated proceedings include an application for certification without a vote pursuant to section 8 of the *Labour Relations Act* (File No. 0471-82-R) and three section 89 complaints (File Nos. 0436-82-U, 0511-82-U and 1279-82-U), in which it is alleged that the complainant trade union (referred to in this decision as the "applicant", the "U.A.W.", and the "union") has been dealt with by the respondent contrary to the provisions of sections 64, 66, 70, 75, 79, and 80 of the Act.

2. The evidence adduced before the Board during the fifteen days of hearing of these matters includes 115 exhibits and the testimony of fourteen witnesses. It is neither necessary nor desirable to detail that evidence in this decision. It is sufficient to note that the findings of fact set forth in this decision are based upon our consideration of the totality of the evidence, in light of our assessment of the relative credibility of the various witnesses, having regard to such factors as the firmness of the witnesses' respective memories, their ability to resist the influence of interest to modify their recollections, the consistency of their evidence, their capacity to express their recollections clearly and their demeanour. We have also considered what is most probable in the circumstances and what inferences may reasonably be drawn from the totality of the evidence.

3. During his cross-examination of the union's first witness, counsel for the respondent, who had earlier requested and obtained an order excluding witnesses (other than advisors) from the hearing room, asked the Board to direct members of the press not to publish any of the evidence prior to completion of the evidentiary portion of the hearing. After hearing and considering the representations of the parties and the members of the press who were in attendance at the hearing, the Board made the following oral ruling, which is included in this decision at the request of counsel for the respondent:

"We have now had an opportunity to consider the submissions of the parties and of the members of the press considering Mr. Filion's



request that the Board direct that none of the evidence given in this case be reported until the evidentiary portion of the hearing has been completed. Assuming without deciding that we have jurisdiction to make such an order, we are of the view that it is not appropriate to do so. A similar request was made before another panel of the Board in the *Automotive Hardware* case and was denied by that panel in an oral ruling. There is nothing in the circumstances of the present case which would prompt the Board to adopt a different approach in these proceedings. Accordingly, Mr. Filion's request is denied. Nevertheless, it may be desirable for counsel to indicate to their respective witnesses that it may be preferable for them not to read the press reports of this case, since it might be a negative factor in terms of the credibility of their evidence."

(The Board also explained to the press the purpose of the exclusion of witnesses and requested their cooperation in the exercise of their professional judgment concerning what information it would be appropriate to publish concerning the evidence given in these proceedings.)

4. The respondent (also referred to in this decision as "Wilco") manufactures steel tubing and fabricates fuel and brake lines. Although some of its products are used in the refrigeration industry, about 90% of its business is related to the automotive industry. At all material times Wilco operated in London (Ontario) and in Glencoe (which is about 40 miles west of London). It also operated a plant at Port Sanilac, Michigan, until April 30, 1982, when that plant was closed. The present proceedings relate to the respondent's London plant.

5. During late April and early May of 1982, various Wilco employees including Chris Bishop, Dick Toner, Dan Matthys, and Doug Noxell, had meetings with representatives of the United Electrical Workers to discuss the possibility of organizing the respondent's London plant. When those employees asked some of their fellow employees to sign membership cards in the United Electrical Workers, they discovered that Dan Wood, another Wilco employee, was organizing on behalf of the applicant. Mr. Wood had earlier been involved in an unsuccessful attempt by the U.A.W. to organize another London company by which Mr. Wood had been employed prior to starting work at Wilco in October of 1979. Messrs. Bishop and Toner subsequently arranged to meet with Mr. Wood and Clare Meneghini on May 20th. Mr. Meneghini, the U.A.W. International Representative in charge of the applicant's Wilco organizational campaign, had already signed up several Wilco employees as a result of organizational activities beginning in late April. Following that meeting, Mr. Bishop signed a total of six Wilco employees into the U.A.W. (two on May 21st, one on the 22nd, two on the 25th, and one on the 26th).

6. In mid May of 1983, Grant Wilson, who is the Chairman, President, and sole owner of the respondent, became aware of the fact that the U.A.W. was attempting to organize his London plant. Mr. Wilson, who at that time was also serving as plant manager of that plant, then met with a number of other members of management to tell them "that there was a union movement going on" and to direct them to keep abreast of organizational activities. He also subsequently met with representatives of the Wilco

Employees' Association (described below) to ask them about "the attitude of the people in the plant" concerning the union's organizing drive.

7. On May 25th and 26th Mr. Wilson held a "captive audience" meeting with the employees on each of the respondent's three shifts. The first of those meetings began shortly after the end of the day shift at 3:30 p.m. on May 25th. It was held in the cafeteria and was attended by approximately 50 employees, plus a number of supervisors. The meeting was addressed by Mr. Wilson and by Jeff Williams, who is in charge of quality control at the London plant. Unbeknownst to management, the entire meeting was recorded by employee Dan Wood using a concealed tape recorder. The following transcript, which the parties have agreed to be an accurate description of what was said by management at each of the three meetings, has been prepared from the tape recording of that meeting which was entered as an exhibit in these proceedings after having been played for the Board during the hearing:

(Per Mr. Wilson) "A couple things: I'm a little bit disturbed, I'm not very happy but I am going to tell you with no threats, no promises, what's going to happen. I understand you have a labour movement under hand, you want to put in your own union and I say that's your prerogative, to do whatever you wish to do. But I have my prerogative as to what I want to do, and I want to ensure you that there will be no further growth in this plant. As a matter of fact, there will be loss of jobs in many areas of relocations. And this is what you've asked for. This is where you're going. I am a little bit disturbed that it's happened, come to that. And I hope you're not being threatened and promised an awful lot of things by these people, who are maybe trying to organize. You be the judge. I'm not threatening you, I never would threaten you, and I am not promising you anything as a result of this. But I do run and control this plant. Let it be known by any labour union who wants to tell you otherwise, I can tell you that right now. I also want to tell you about a General Motors survey who was in here Friday last week. Furthermore, I'll point out some samples that are absolutely going out of here that I am getting a little bit tired of, and the customer. They give us what they call a five, and on the bottom of this report it absolutely says, "All General Motor's Purchasing Divisions are hereby advised to establish alternative sources as soon as possible". That's regarding your quality. Now I hope you're proud, because I'm not. I have been in here all weekend, I've had a vice-president from General Motors in here, pretty high up. He's been a friend of mine, and I can only tell you, the attitude of General Motors Corporation in the United States with Canada is this, and this is right from the top: that you know Canada is falling apart, and it's typically seen right today because the U.A.W. said that they will not take any concessions like they did in the United States, because Bob White and his team says, "Ah we ain't gonna do it". Well let me just tell Bob White, who sits on a Board of mine - not on a company Board but a Board where I'm Director or Chairman of, of the new technical centre - you better smarten up, because they're not gonna have any jobs this fall. The Americans are fed up with the

Canadians and their attitude, and they got to be fed up with us with what they're getting. And we're asking for it, we're absolutely asking for it. And if you think that Pierre Trudeau can give you a job, and if you can go down the road and find a job, then by God be gone, and go get it. Because I tell you one thing, I've said it time and time again, the day you organize here, [unintelligible expletive]. And there's been a lot of good people around here who have done a lot of good job, and I don't know who the s.d's are who's creating it, whatever it may be, but your job security has been threatened as a result of it. And I do not have to employ 200 or 50 or 20, I guarantee that right now. I don't want to do it, but you're asking me to do it. I hope you're proud of what we see today. Jeff, can you show then what's come out of the product today?

(Per Jeff Williams) .... I was handed these about fifteen minutes ago, they came out of the fabrication, they were in boxes ready to be shipped out to a customer. Now I don't know how in God's green earth we'd ever put fuel through a pipe that's squeezed tight, but it did come out of a box. That's only one. Another one where some of the girls know there's supposed to be white telfon tape on top of this particular fitting, there is none. Bump and cone, you got the bump but there's no cone. Here's another end form, that's supposed to be a bump and a cone. I can see part of a bump or part of a cone, but no bump at all. This is only out of today's in the boxes. Now a couple of the inspector packers have spotted it. Here's one that hasn't got anything, but it's ready to go. Same thing applies all the way through and it's going out to the customer, the customer is receiving it. You gotta keep a close eye on this quality, because just like Grant was saying, they are going to hose you to death, because they're fed up.

(Per Mr. Wilson) Well, you've heard from me and I'm very serious about it. I hope your actions don't go to where some people say they're going, but if they do, be prepared to see the changes. You asked for it, if that's what you want, I'm a little disturbed that you've gone this way, after I've been asking for it. But don't blame that on a tube mill or the customer or whatever you may be. I can tell you that right now. Don't blame that on somebody else. How would you like to get it? How would you like to receive that? And I hear a lot of excuses but I see a lot (inaudible). Well, I'm sorry to see it come to this level, I really do. And if people are that stupid, to read in the damn papers and see what's going on in this country, then you might as well be part of it, you might as well enjoy it. Cause I don't know how you are going to negotiate when all our U.S. competition are paying lower wages than we are, a guy across the city is paying lower wages that we are, and how do you want us to compete? I don't know. Especially when we get this kind of quality. We can't even go to the customer and say we got the best quality in the world, so give us a price increase. We can't even do that when you see this kind of stuff.



(pause) So I'm not very pleased. I didn't ever think it'd come to this, and I hope it doesn't come to this. If it does, I guess maybe you haven't seen the back side of me (inaudible). I've always hoped they've had an association that would do something, and come in and do it, but not this way. I accept it. There is going to be some changes over the next couple weeks I guarantee you, serious changes. I guess I will start removing as a result of that (inaudible) confidence of my people around here. But I guess I'll start taking jobs out of here, jobs out of here. I hate to do it but nobody is going to threaten me or do that to you. I brought jobs back in here to keep jobs but I don't have to do that in the future, I guarantee I don't have to do that in future. And that's no threat. Because there's lot of areas who would like to have jobs without a gun being put at people's head and I know our customers would like to have quality, and if you call that quality, whatever's going on – pretty sad. And people are a little concerned why I have asked them to be responsible for quality around here? Not when I see this kind of level, not when I see this kind of stuff, do I call that responsibility. And I'd like to think there are some very good people around here, but I think the very good people better address the very not so good people and address management on it for their own survival, their own families or whatever may be for their future. And that's exactly where it is. Don't ever let me take some drastic, drastic action, because if that's what you want, I'll do it.

Are there any comments or questions from the floor?

Thank you."

The expletive used by Mr. Wilson after the words "the day you organize here", was said by various witnesses to be "doom", "blooey", or a similar sounding word. Whatever word was actually used by Mr. Wilson, it was a very loud utterance accompanied by the gesture of lifting his arms above his head and moving his arms quickly apart as if to suggest an explosion.

8. Mr. Wilson's comments were forcefully delivered in an angry tone which could not have failed to have made a deep and lasting impression on the assembled employees. The evidence also establishes that Mr. Wilson is perceived by employees to be a "high powered" individual who "means what he says". The May 25 and 26 meetings were not the first meetings which Mr. Wilson had held with employees to discuss matters of concern such as product quality and employee wages. However, they were the first meetings at which Mr. Wilson made extensive comments concerning unionization of the plant.

9. Section 64 of the Act provides:

"No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or

contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.”

We accept Mr. Wilson’s evidence that the source of the anger that he displayed at those meetings was primarily Wilco’s very poor quality evaluation by General Motors. However, it is apparent that he was also very upset about the applicant’s organizing campaign. There can be no doubt that Mr. Wilson’s comments at those meetings far exceeded an employer’s freedom to express the views, and constituted intimidation, threats, and undue influence (see, for example, *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848; *The Globe and Mail Division of Canadian Newspapers Company Limited*, [1982] OLRB Rep. Feb. 189; and the authorities referred to in those decisions concerning the ambit of an employer’s “freedom to express his views” in the context of the *Labour Relations Act*). Despite his disclaimer, Mr. Wilson was indisputably threatening employees with “loss of jobs”, diminished job security, and other adverse consequences as a result of their union activities. His comments, taken as a whole, constitute a flagrant violation of sections 64, 66, and 70 of the *Labour Relations Act*.

10. The union further alleges that the respondent contravened the Act by discharging union organizers Ron Molyneux, Chris Bishop, and Frank Duquette. Mr. Molyneux was an active supporter of the union who attended a number of organizational meetings and signed a total of six employees into the union prior to May 26th when he was discharged by the respondent. (Following his discharge, he signed five more employees into the union.) Mr. Wilson testified that he terminated Mr. Molyneux’s employment because supervisor Stan Goodbrand provided him (Mr. Wilson) first with oral information, and then with a written statement by another employee that Mr. Molyneux was soliciting for the union on company time and premises during his working hours. Neither the written statement, nor the (unidentified) person who allegedly prepared it, was produced before the Board in these proceedings. Moreover, Mr. Goodbrand’s testimony was not supportive of Mr. Wilson’s evidence with respect to the former’s involvement in obtaining the oral information and written statement in question. When Mr. Wilson accused Mr. Molyneux of engaging in such activity, Mr. Molyneux neither confirmed nor denied it. After telling Mr. Molyneux that he was disappointed in his actions, Mr. Wilson summarily terminated Mr. Molyneux’s employment.

11. On May 27th, Mr. Wilson threatened to discharge Dick Toner for soliciting for the union on company time and premises. It was Mr. Wilson’s evidence that he took this action on the basis of a verbal statement by Mr. Goodbrand which was followed by a written statement provided by another (unidentified) employee. When Mr. Toner vehemently denied having engaged in any such activities, Mr. Wilson told him, “I’m between you and the person who gave me the statement. If you want to give me another statement that says you’re not, I guess I’ll accept it because I have nothing to refute it.” Mr. Toner provided the requested statement and remained in the employ of the respondent, although he was subsequently warned by Mr. Goodbrand to “be careful” since Mr. Wilson suspected that he was “still involved”.

12. Mr. Bishop was discharged by the respondent on May 28th. The reason given by Mr. Wilson for the discharge of Mr. Bishop was that he was soliciting for the U.A.W. in the plant during working hours. When Mr. Wilson confronted him with that allegation, Mr. Bishop denied the allegation and stated that he “did it after hours”. Mr. Wilson

replied that he had written statements by employees indicating that Mr. Bishop signed them up in the plant during working hours. When Mr. Bishop asked to see those documents, Mr. Wilson stated that they were "strictly confidential" and refused to show them to him. As in the case of Mr. Molyneux, neither those statements nor the (unidentified) persons who allegedly prepared them were produced before the Board in these proceedings.

13. In his testimony before the Board, Mr. Bishop stated that he "signed up four employees [on behalf of the U.A.W.] in the plant during working hours". Two of those signatures were obtained after Mr. Wilson's May 25th speech. When asked in cross-examination why he did not wait until break time or after work instead of signing them up during working hours, Mr. Bishop replied that employees came right up to him in the plant and asked him for cards.

14. The (Unemployment Insurance) Record of Employment subsequently issued by Wilco in respect of Mr. Bishop specified "soliciting for U.A.W." as the reason for Mr. Bishop's termination. That document was issued on behalf of the respondent by April Leonard, a payroll-personnel clerk, on June 1, 1982. Although Ms. Leonard did not specifically consult with anyone concerning the reason for discharge that was to be specified on Mr. Bishop's record of employment, she did speak with Jim Hogan, the respondent's Controller, about the reason for discharge that was to be specified on Ron Molyneux's Record of Employment, which was issued by Ms. Leonard that same day. During that discussion, Mr. Hogan told her to indicate that Mr. Molyneux was terminated "for soliciting for the union". Accordingly, she entered "soliciting on U.A.W." as the reason for discharge specified on Mr. Molyneux's Record of Employment. The reason that Ms. Leonard did not consult with Mr. Hogan concerning the reason for discharge to be entered on Mr. Molyneux's Record of Employment was that she (correctly) assumed that he was discharged for the same reason that Mr. Bishop was discharged. Mr. Hogan did not testify in these proceedings. Although he was not directly involved in the discharge of Mr. Molyneux, it is reasonable to infer that as a high-ranking official of the company, he had some knowledge concerning that matter. Similar observations are applicable to the Record of Employment prepared by Ms. Leonard on June 15, 1982 in respect of Frank Duquette's termination. The reason for discharge specified on that document by Ms. Leonard, in consultation with Mr. Hogan, was "soliciting for U.A.W.". As in the case of Messrs. Bishop and Molyneux, no mention of "company premises" or "working time" was made on the form.

15. The "employee termination" form prepared by management for inclusion in Mr. Bishop's personnel file also provides some insight concerning the true motivation for his discharge. In completing that form, Mr. Hanson, who was Mr. Bishop's supervisor, wrote the following "explanation": "Chris was terminated for soliciting plant personnel to sign up for an outside union". Mr. Wilson subsequently added "on Company premises" (and a further notation specifying that Mr. Bishop be given "no severance pay" because his termination was for "wilful misconduct"); he made no reference to "working time" on that form. Mr. Wilson also revised the explanation ("organizing union activities") written on Mr. Duquette's employee termination form to read: "Organizing and soliciting union activities on company time". Only Mr. Molyneux's form reflected the precise reason put forward by Mr. Wilson at the hearing of this matter as the sole motivation for all three discharges, namely, soliciting plant personnel for the union on company time and company property. While this internal documentation is not conclusive as to motivation,



it does provide some support for the union's contention that management's real concern was that the employees were union organizers, not that they were organizing on company premises during working hours. This was also apparent from the testimony before the Board in which management witnesses appeared in several instances to be adding references to "company premises" and "working hours" as an afterthought, following mention of "soliciting for the union".

16. Mr. Duquette was discharged by the respondent on June 9, 1982. He was also an active supporter of the union, who attended organizational meetings and signed six employees into the union. The reasons given to him for his discharge by Mr. Wilson were similar to those described above in relation to Messrs. Molyneux and Bishop. When Mr. Wilson accused him of signing up people in the plant on company time, Mr. Duquette denied having done so but was discharged anyway, purportedly on the basis of certain "confidential statements" which Mr. Wilson refused to show to Mr. Duquette. Mr. Duquette, whom we found to be a candid and credible witness, testified that he had not signed anyone up on company time with the exception of one employee that he signed by the time clock just before his (Mr. Duquette's) shift started and just as that employee's shift was ending.

17. In these proceedings the respondent sought to justify the charge of Messrs. Molyneux, Bishop, and Duquette on the basis of the following "general plant rules" contained in the "Employees Handbook":

"The purpose of plant rules is to define and protect the rights of all employees and to establish an order of conduct necessary to the successful operation of the plant. Commission of any of the following prohibited acts will result in disciplinary action, ranging from reprimand, up to and including discharge, depending upon the seriousness of the offense. The enumeration in this list of certain rules shall not be construed to deny the right of the company to discipline an employee for an act or cause not enumerated by the company.

Violation of those rules indicated by an asterisk (\*) will result in immediate dismissal.

• • •

(25) Soliciting or collecting contributions for any purpose whatsoever on company premises, without specific approval of management.

\*(26) Distributing literature, written or printed matter of any description on company premises, without the specific approval of management."

(Rules 1 to 24 and 27 to 31 have been omitted. In addition to Rule 26, an asterisk also appears beside 14 other rules.)

18. A useful review of the Board's approach to such "no-solicitation" and "no-distribution" rules is contained in the Board's recent decision in *The Adams Mine, Cliffs of Canada Ltd., Manager*, [1982] OLRB Rep. Dec. 1767, at paragraphs 15 to 22. In

that decision the Board analysed the pertinent Canadian and American jurisprudence, as well as the applicable provisions of the *Labour Relations Act*, including section 71 which provides:

“Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade him during his working hours to become or refrain from becoming or continuing to be a member of a trade union.”

On the basis of that analysis, the Board arrived at the following general principles:

“(a) No-solicitation or no-distribution rules which prohibit union solicitation on company property by employees during their non-working time are presumptively an unreasonable impediment to self-organization and are therefore invalid; however, such rules may be validated by evidence that special circumstances make the rule necessary in order to maintain production or discipline;

(b) No-solicitation or no-distribution rules which prohibit union solicitation by employees during working time are presumptively valid as to their promulgation, in the absence of evidence that the rule was adopted for a discriminatory purpose or applied unfairly; and no-solicitation or no-distribution rules which prohibit union solicitation by non-employee union organizers at any time on the employer’s property are valid in the absence of an application for a direction pursuant to section 11.”

See also *International Chinese Restaurant*, [1977] OLRB Rep. Oct. 681; *Renfrew County Roman Catholic Separate School Board*, [1970] OLRB Rep. Feb. 1381; *Audio Transformer Limited*, [1969] OLRB Rep. Nov. 994; *Indalprime Limited*, [1969] OLRB Rep. Aug. 652; *The Talisman Motor Inn*, [1968] OLRB Rep. Apr. 80; *Data Business Forms Limited*, [1966] OLRB Rep. Dec. 714; *McNair Products Company Limited*, [1966] OLRB Rep. Oct. 518; *Norfish Limited*, [1965] OLRB June 226; *Barbara Jarvis and Associated Medical Services Limited*, [1961] OLRB Rep. June 973; and *Cominco Ltd.*, [1981] Can. LRBR 499 (B.C.L.R.B.).

19. Having carefully considered all the pertinent evidence and submissions of the parties, we are of the view that plant rule 26 does not assist the respondent’s case. Although the respondent attempted to rely on that rule during the course of these proceedings, it is apparent from the documentary and other evidence adduced before us that management did not at the time of the impugned discharges suggest that any of the grievors were discharged for “distributing literature, written or printed matter of any description on company premises”. The purported reason for discharging them was their solicitation efforts for the U.A.W. on company time and premises. Thus, we agree with union counsel’s contention that the respondent’s purported reliance on plant rule 26 was “an afterthought”, belatedly relied upon in an attempt to “build a case”.

20. It remains to determine whether the respondent can legitimately assert plant rule 25, read in conjunction with section 71 of the Act, as justification for the impugned discharges. Since the rule purports to apply to employees not only during their working

hours, but also during non-working hours, it is for the reasons set forth in *The Adams Mine* case presumptively an unreasonable impediment to self-organization and, therefore, invalid to the extent that it purports to apply during non-working time. (It was not suggested that there are any special circumstances which make the rule necessary in order for the respondent to maintain production or discipline.) Nevertheless, counsel for the respondent contends that his client applied the rule in a context in which it is presumptively valid, i.e., solicitation on company premises during working hours. However, the Board finds that rule 25, read in conjunction with section 71 of the Act, does not provide the respondent with a valid defence to the union's allegations that the respondent contravened the Act by discharging Messrs. Molyneux, Bishop, and Duquette. We have reached that conclusion on the basis of a number of factors. First, it is clear from the evidence that prior to the discharge of those three individuals, the respondent had never before discharged anyone for soliciting or collecting contributions on company premises without the approval of management, nor had employees ever been warned that discharge would be the consequence of such conduct. Indeed, the lack of an asterisk beside rule 25 would reasonably lead employees to believe that violation of that rule, as opposed to violation of one of the 15 rules marked with an asterisk, would not "result in immediate dismissal", but rather would result in a less severe form of disciplinary action, such as a warning or suspension. As stated by the Board in *McNair Products Company Limited*, [1966] OLRB Rep. Oct. 518, at paragraph 17:

"When attempting to determine whether the steps taken by an employer to put an end to persuasion by employees during working hours to cause other employees to become members of a trade union are taken in good faith pursuant to the provisions of section 53 [now section 71] of the Act or are taken primarily to thwart the employees' attempt to join a trade union of their own choice, it is often very revealing to look at the nature of the disciplinary action taken. Quite obviously, a warning to such employees would be sufficient to accomplish the employer's purposes in most cases. A suspension may be necessary in other cases where the warning is ignored or there is real interference with production or plant discipline. In extreme circumstances it may well be that the discharge of employees is the only way to put an end to the practice. Where, however, the extreme remedy is adopted without so much as a prior caution, even in the form of a plant rule to that effect, a doubt is created as to the true intentions of the employer."

As indicated above, although the Employees Handbook contained a plant rule prohibiting soliciting or collecting contributions on company premises without management approval, it was not one of the plant rules identified in that booklet (or elsewhere) as providing grounds for immediate dismissal. Furthermore, if Mr. Wilson's concern about solicitation of union membership evidence in the plant was in fact motivated by a desire to avoid disruption of production, it is difficult to understand why he did not raise the matter at the May 25 and 26 meetings, or otherwise notify employees of his concern. The fact that Mr. Wilson remained mute with respect to that matter leads us to infer that his true intention was not to avoid disruption but rather to use information concerning such activities as a pretext for removing union organizers from the respondent's work force.



21. We also find that the respondent's purported application of plant rule 25 in the circumstances of this case represents an unfair and discriminatory invocation of that rule. To appreciate the validity of that conclusion, it is appropriate to contrast the respondent's treatment of representatives of its employees' association with its treatment of union supporters, as described above. The Employees Handbook provides for an employees' association that has been "recognized" by the respondent for the following purposes (listed on page 3 of the handbook):

"(1) To bargain for hourly employees annually for wages, benefits, and working conditions in the best interest of employees and company.

(2) To assist and co-ordinate with hourly employees and company management on Employee and Working Condition Grievances.

(3) To assist with company management on the organization of employee social functions throughout the year.

(4) To assist the company in managing cafeteria operations as provided by the company under company guidelines and rules."

The respondent permits the association to hold meetings in the plant and provides the association with its own bulletin board in the plant for posting association material. It has also permitted the association to attach to employee pay cheques letters urging employees to support the association. It also deducts association dues from the employees' wages and remits the funds to the association. Although the association organizes social events, it also functions as an "alternative to a union". Employees go to the association with grievances and look to the association to represent them at periodic meetings with management. That the respondent's invocation of plant rule 25 against union supporters represents an unfair discriminatory application of that rule is evident from the fact that the association has always been freely permitted to sell raffle tickets for "50/50 draws" and "Texas mickeys" on company time and premises. That similar privileges would not be extended to the U.A.W. was abundantly obvious from tenor of Mr. Wilson's remarks to employees on May 25th and 26th. Moreover, we infer from the totality of the evidence that at least some members of management turned a blind eye to efforts by association officials, on company time and premises, to encourage employee support for the employees' association and opposition to the U.A.W.

22. As indicated above, Mr. Bishop conceded that he signed up some employees on company time and premises. However, it was also his uncontradicted evidence that some of those employees approached him and asked him for union cards. One employee came to him during working hours and gave him a card which had been signed by another employee. Since the other employee did not have a dollar at the time he signed, Mr. Bishop received a dollar from him later that day while he was in the employee's work area checking on a production matter. There is no evidence that Mr. Bishop was attempting during working hours to "persuade" employees to become members of the union, within the meaning of section 71 of the Act. (See *International Chinese Restaurant, supra*, in which the Board noted (at paragraph 24) that "persuasion ... involves the conversion of someone to a particular view that was not held before, and the

attempt to persuade would involve at least the espousal of a position with the accompanying attempt to convert someone to that position.”) Moreover, there is no evidence that Mr. Bishop’s actions caused any disruption in the plant or any interference with production. There is also no cogent evidence that Messrs. Molyneux and Duquette attempted to persuade anyone during working hours to become (or refraining from becoming) members of a trade union. Moreover, having regard to all the circumstances, including the blantly anti-union attitude displayed by Mr. Wilson at his captive audience meetings with employees and the contradictory and unsatisfactory nature of some of the evidence given by management witnesses concerning the events which preceded those discharges, we find that the respondent’s motivation for discharging Messrs. Molyneux, Bishop, and Duquette was based upon a desire to thwart the union’s organizational campaign, rather than a desire to maintain order on its premises or ensure that production would not suffer.

23. For the foregoing reasons, we find that the respondent contravened sections 64 and 66 of the Act by discharging Messrs. Molyneux, Bishop, and Duquette, and that the respondent cannot rely upon its plant rules or section 71 as a shield in the circumstances of this case.

24. The union filed its application for certification with the Board on June 8, 1982. The (Form 6) “green sheet” was posted in the plant on June 11. By June 16, the terminal date fixed for this application and the date which the Board has determined under section 103(2)(j) of the Act to be the time for the purpose of ascertaining membership under section 7(1), the union had filed with the Board membership evidence on behalf of 96 of the 185 employees in the bargaining unit (described below) on the date of the application.

25. The union’s application for certification initially came before another panel of the Board on June 28, 1982. In a decision dated July 6, 1982, that panel appointed a Board Officer to inquire into and report to the Board on the list and composition of the bargaining unit (including a number of specific issues pertaining to the list). During the course of the officer’s inquiry, the parties resolved their differences concerning those matters through a written agreement dated July 21, 1982, and agreed to waive the formal examination and report anticipated by that decision. Thereafter, the application was scheduled for hearing before the present panel for the purposes of considering the union’s request for certification without a vote under section 8 of the Act, together with its complaints under section 89.

26. On June 30, 1982, the respondent, through its solicitors, offered to reinstate Messrs. Molyneux, Bishop, and Duquette “without prejudice to the right of the union to argue ... that the three employees were terminated contrary to the *Labour Relations Act*”, with the issue of liability and compensation being left for determination by the Board. That offer was made in a telephone conversation between counsel and was subsequently confirmed by letter dated July 15, 1982. In response to that letter, counsel for the union wrote as follows (in a letter dated July 16, 1982):

“We acknowledge receipt of your letter of July 15th in this matter.

I acknowledge that you suggested to me in a telephone conversation that your client would be prepared to ‘take back’ Messrs. Ron Molyneux, Chris Bishop and Frank Duquette, at some indefinite date

to be ascertained by your client. You also indicated to me that this would be without prejudice to your client's position that the termination of these employees was proper and not in violation of the *Labour Relations Act*. You further indicated that it would have to be understood that when these three persons were returned, that they would be subject to the plant rules contained in the employees booklet, and could be disciplined for any infraction thereof.

It is the position of the three employees in question and of the union that your client's proposal is totally unacceptable. Your client has engaged in serious and extensive unfair labour practices as alleged in the complaints and particulars and has engaged in further such activity of a very serious nature which will be constituting the subject matter of further allegations of unfair labour practices and perhaps additional complaints. It has been our advice to our clients that it would be foolhardy for them to accept anything short of full resintatement with compensation of all of the employees who have been terminated and 'laid off', together with an agreement from your client that the Company is prepared to accept the application of Section 8 by the Labour Relations Board to certify the Union outright. Further, our clients would also insist on a posted notice and a letter being given by your client to all of the employees that they have a right to collective bargaining and a Union of their choice under the *Labour Relations Act*, and a posted undertaking from your client that there will be no further violations of these rights in the future. Our client would also require an opportunity to talk to the employees in the plant for the purpose of soliciting their support and membership.

Our clients are constrained to take the position, in their best interests, that they can only protect their rights to union representation and from further employer unfair labour practices by a decision from the Labour Board with appropriate cease and desist orders and otherwise, and the protection of Union representation."

27. Following union counsel's rejection of the respondent's reinstatement offer, on or about July 30th Mr. Wilson wrote directly to Messrs. Molyneux, Bishop, and Duquette to advise them that their terminations had been "rescinded" and that they were "being recalled to work at Wilco" on August 10th. Mr. Wilson's letter to Mr. Bishop stated:

"This is to advise you that your termination has been rescinded and you are being recalled to work at Wilco-Canada, Inc. Due to a number of recent layoffs, your previous position of Slitter Operator is now held by a more senior employee. In accordance with the Company's practise and procedures as set out in the Employee's Handbook, your seniority entitles you to a job which you are capable of performing without training. Due to your previous experience as a Material Handler, we have scheduled you to return to work as a Material Handler on Monday, August 10, 1982. It is necessary that you report to the Personnel office during normal office hours on or



before Friday, August 7, 1982, in order to complete the documentation necessary for your return to work and arrange your shift assignment.

It is important that you understand that by returning to work you will not prejudice or abandon any claims for compensation which are now before the Ontario Labour Relations Board."

Similar letters were sent to Messrs. Duquette and Molyneux. By letter dated August 3, union counsel confirmed that the respondent's offer had been rejected by the U.A.W. and the three grievors. In that letter, counsel noted that the "terms and conditions stipulated by [the respondent] for the return of these grievors to work not only contemplates reinstatement in a position other than their original job but does nothing to provide them with the kind of protection referred to in [counsel's] letter of July 16th."

28. At the hearing of this matter, counsel for the respondent contended that Messrs. Molyneux, Bishop, and Duquette should not be awarded any compensation for the period following the respondent's offer to reinstate them. It was his position that their failure to accept reinstatement without prejudice to their claims for compensation under the *Labour Relations Act* constituted a failure to duly mitigate their loss. Counsel for the union, on the other hand, reiterated the position set forth in his letter of July 16, 1982. In support of his submission that the grievors could not reasonably have been expected to accept the respondent's offer of reinstatement, counsel referred the Board to *Payzu Ltd. v. Saunders*, [1919] 2 K.B. 581 (C.A.), and *Theisson v. Leduc*, [1975] 4 W.W.R. 387. The *Payzu* case involved a contract for the sale of certain material that was to be delivered to the plaintiffs as required over a period of nine months. The contract provided for payment to be made for each instalment within one month of delivery. When the plaintiffs failed to make punctual payment for the first instalment, the defendant breached the contract by refusing to deliver any more of the goods. However, the defendant offered to deliver the goods at the contract price if the plaintiffs would agree to pay cash at the time of delivery. In a judgment upholding the trial judge's ruling that the plaintiffs should have mitigated their loss by accepting that offer, Bankes L. J. wrote (at page 588):

"It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case. There may be cases where as matter of fact it would be unreasonable to expect a plaintiff to consider any offer made in view of the treatment he has received from the defendant. If he had been rendering personal services and had been dismissed after being accused in the presence of others of being a thief, and if after that his employer had offered to take him back into his service, most persons would think he was justified and that it would be unreasonable to ask him in this way to mitigate the damages in an action of wrongful dismissal."

In *Thiessen v. Leduc*, *supra*, the Alberta Supreme Court held that when the plaintiff was wrongfully dismissed from his position as constable of the defendant town, he was free to wait for employment in his chosen field as a policeman and was not required by the principles of mitigation to accept the defendant's vague offer of alternate employment as

“assistant recreation director” with unspecified duties which he feared might involve anything from truck driving to manual labour. The Court also noted that the defendant was “not well disposed” to the plaintiff as evidenced by the fact that an alderman, who was the chairman of the defendant’s police committee, had shaken his fist at the plaintiff during the course of his wrongful dismissal, and “called the plaintiff obscene names” in the presence in the plaintiff’s wife. Although Lord Justice Burkes’ view was *obiter dicta*, and the *Thiessen* case merely indicates that a wrongfully discharged employee need not accept a substantially lesser position, there is some common law support for the applicant’s position: see, for example, *Michaud v. Stroobants*, [1919] 3 W.W.R. 46 (Alta. C.A.); *Shindler v. Northern Raincoat Co. Ltd.*, [1960] 1 W.L.R. 1038 (Q.B.D); and *Yetton v. Eastwoods Froy Ltd.*, [1967] 1 W.L.R. 104 (Q.B.D). However, there are a number of other common law authorities which have reached the opposite conclusion. For example, in *Lloy v. Billman* (1906), 1 E.L.R. 351 (N.S.), Russell J. held that a salesman who had been wrongfully dismissed by the defendant was not entitled to claim for loss of wages after the date on which the defendant offered to rehire him. Moreover, in a more recent decision, the Chief Justice of the Trial Division of the Nova Scotia Supreme Court found that a plaintiff who was dismissed had failed to properly mitigate his damages when he refused, approximately two months later, to accept the respondent’s offer of a position of comparable stature: *Gould v. hermes Electric Ltd.*, [1978] 3 A.C.W.S. 356. See also *Sweetlove v. Redbridge and Waltham Forest*, [1979] I.C.R. 241 (Employment Appeal Tribunal), and *Bruce v. Calder*, [1895] 2 Q.B. 253. Thus, there are a number of cases which support the following proposition contained in Hepple & O’Higgins, *Employment Law* (4th Ed. London: Sweet & Maxwell, 1981) at 296:

“Unreasonable refusal to accept an offer of reinstatement made by the employer who has wrongfully dismissed an employee may be considered as a failure to mitigate”.

29. The foregoing review of the caselaw indicates that the common law authorities are not totally uniform in their treatment of this issue, although some of the disparate results appear to emanate from factual distinctions rather than from differing views concerning the applicable legal principles. Moreover, the wrongful dismissal decisions which find that the duty to mitigate does not require a discharged employee to accept an offer of re-employment by his former employer appear to be based primarily on the “personal considerations operating in the context of the contract of employment”, and the prejudice to the personal relations between the parties which may result from the manner in which the wrongful dismissal has occurred (see Freedland, *The Contract of Employment* (London: Oxford University Press, 1976) at 263). In determining the extent to which similar considerations are relevant in the context of a discharge which contravenes the *Labour Relations Act*, it must be borne in mind that there are significant distinctions between an action for wrongful dismissal and a section 89 complaint in respect of an unfair labour practice discharge. The object of an action for wrongful dismissal is not to obtain reinstatement in the position from which an employee has been dismissed, but rather to obtain damages equal to the remuneration which would have been earned during the period for which the employment would have continued if the employer had given the employee reasonable notice of termination. Indeed, the courts have traditionally declined to specifically enforce an employment contract by directing an employer to reinstate a wrongfully dismissed employee. Thus, the common law recognizes that an employment contract can legally be brought to an end through proper

notice. While compensation for loss of earnings occasioned by an unfair labour practice discharge is also a significant remedy granted by the Board under section 89(4), an equally important remedy that is almost invariably granted by the Board in such circumstances is reinstatement. The Board also generally orders an employer who has discharged an employee in contravention of the Act, to post a notice on his premises to communicate to employees affected by the unfair labour practice that he has been found to have contravened the *Labour Relations Act* and will henceforth conform to the requirements of the Act (see *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254). This unique remedy, which has been developed by labour relations tribunals to respond to the psychological impact of unfair labour practices, underlines the fact that, unlike the Courts in wrongful dismissal cases, the Board, in unfair labour practice discharge cases, is not concerned with enforcing consensual commitments which parties may have made to one another in the context of an employment contract; the Board's concern is the effective enforcement of a public statute which enshrines the freedom of every employee to join a trade union of his or her own choice, and to participate in its lawful activities.

30. Some recent arbitration awards have granted compensation without reinstatement where the circumstances of the case indicated that there was little likelihood of a future acceptable employment relationship between a discharged grievor and the employer which had discharged him or her without just cause. See, for example, *Re Lily Cups Ltd. and Printing Specialties and Paper Products Union, Local 466* (1981), 3 L.A.C. (3d) 6 (Brown), where animosities between the grievor and his immediate supervisor, who were required to work together in a small boiler room plant, had resulted in a number of altercations; see also *Re Extendicare Ltd. (St. Catharines) and Ontario Nurses' Association* (1981), 3 L.A.C. (3) 243 (Adams), where the grievor, a registered nurse who had been a "team leader" on her shift at the employer's nursing home, demonstrated a continuing failure to recognize that she was not meeting the reasonable expectations of the employer and that a substantial problem existed in her management of the nursing team. Whatever the merit of such an approach in the context of an employer's breach of a "just cause" provision in a collective agreement, the important symbolic value which the reinstatement of an employee in the workplace has in demonstrating to other employees this Board's power to enforce the "rule of law" in the workplace by effectively remedying unfair labour practice discharges, militates against adoption of such an approach in the context of a discharge motivated in whole or in part by anti-union animus. Thus, one of the Board's primary concerns in such circumstances is to have the *status quo ante* restored as quickly as possible through reinstatement of the individual who has been illegally discharged. Only in very exceptional circumstances is reinstatement not granted by the Board, such as where the employer's business has been closed (see *Academy of Medicine*, [1977] OLRB Rep. Dec. 783), or where the employer has sold his business to an innocent purchaser who was unaware of his predecessor's unfair labour practice at the time of the sale and in respect of which no unfair labour practice proceedings were pending at the time of the sale (see *The Winchester Press Limited*, [1982] OLRB Rep. Feb. 284).

31. The issue of whether a discharged employee must accept an offer of reinstatement from his or her employer pending disposition of a grievance concerning the discharge was dealt with by a board of arbitration in *Re Ottawa West End Villa and Ontario Nurses' Association* (1977), 15 L.A.C. (2d) 417 (Fraser). In that case the grievor was discharged from her position as a registered nurse on the 4:00 p.m. to midnight shift



for being absent from work without having provided a reason satisfactory to the administrator. Moments after her discharge, the grievor was offered a "lesser position" in terms of seniority and convenience than the position from which she had been dismissed. The board of arbitration held that "where an offer of a lesser position is made following immediately on a discharge, ... a refusal to accept such offer is not a failure to mitigate damages." The rationale for that conclusion is expressed in the following passage from the majority award (at page 420):

"What, then, might one expect to be the reasonable and prudent behaviour of a discharged employee who is made an offer of re-employment, when a grievance is pending respecting the discharge? At the outset, it is reasonable to assume that the employee will, in most cases that result in reinstatement, have a reasonable conviction that he or she has been 'wronged' in some way by the employer. The employee may expect to feel shocked and indignant at being discharged, and will regard the employer as an adversary, if not an outright enemy. Any offer of re-employment which occurs immediately after, or close to the discharge, would naturally be regarded with deep suspicion, particularly if a grievance has been lodged. Co-optation would be feared. It is to be expected under such circumstances that the prudent employee would refuse the offer, and we would agree ... that such refusal cannot accordingly be viewed as a failure to mitigate at that time."

However, the majority found that the grievor's refusal to accept a second job offer made ten weeks later by the employer did constitute a failure to mitigate. The position she was offered at that time was that of a registered nurse on the day shift. Although acceptance of that position would have involved "some accommodation or compromise in her life-style", the majority found that "after 10 weeks of fruitless searching in a tight job market" the grievor ought reasonably to have reduced her expectations and become less selective. Having noted that none of the reasons given by the grievor for rejecting that offer related to any possibility that the grievor might have felt that she would be jeopardizing her position in the grievance by accepting that second offer, they concluded that "she failed to act in a reasonable and prudent manner by failing to accept that offer" and that, as a result, her entitlement to damages was restricted to the ten week period following her discharge. (See also *Re Dominion Stores Ltd. and Retail, Wholesale and Department Store Union, Local 414*, (1978), 18 L.A.C. (2d) 377 (Brown).)

32. In *Sutton Place Hotel*, [1980] OLRB Rep. Aug. 1250, the Board wrote:

"9. A person who has been discharged has a duty to take reasonable steps to mitigate his loss by seeking alternate employment (see *Ernie's Signs Limited*, [1976] OLRB Rep. Aug. 404; *Lyman Tube Division, Jannock Industries Limited*, [1974] OLRB Rep. July 456; and *Murray Bros. Lumber Co. Ltd.*, [1969] OLRB Rep. Feb. 1194). Where a grievor makes no real effort to obtain alternate employment or otherwise mitigate his loss, he will not be entitled to any compensation for loss of wages (see *Cords Canada Ltd.*, [1973] OLRB Rep. Aug. 429 and *Little Bros. (Weston) Limited.*, [1975] OLRB Rep. Jan. 83).

10. The burden of proof that the grievor has failed to take reasonable steps to mitigate his loss falls upon the respondent, as indicated by the Supreme Court of Canada in *Red Deer College v. Michaels and Finn*, 75 CLC ¶14,280 at pages 581 and 582:

'...The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a 'duty' to mitigate should be understood in this sense.

In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he had taken reasonable steps to avoid their unreasonable accumulation ...

In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial Judge's assessment of the plaintiff's evidence on avoidable consequences ...."

Whether or not a grievor has taken reasonable steps to attempt to mitigate his loss is a question of fact dependent upon the particular circumstances of each case (see *Murray Brothers Lumber Co. Ltd.*, *supra*).

33. Applying the above principles and considerations to the circumstances of the present case, the Board finds that Messrs. Molyneux, Bishop, and Duquette could and should reasonably have avoided the losses which they have suffered from and after August 10, 1982 by accepting the respondent's offer of reinstatement to the positions to which their respective seniority entitled them in light of the layoffs which had been implemented by the respondent for bona fide business reasons. To be effective to relieve an employer from further liability, an offer to reinstate an illegally discharged employee should generally be on the same terms as those enjoyed by the individual prior to discharge. Any adverse modification in terms and conditions of employment may provide an indication that the reinstatement offer was not made in good faith. However, where, as in the present case, the Board is satisfied that the position which each illegally discharged employee is offered is the position to which his seniority entitles him in light of the bona fide layoffs which have occurred in the plant, an offer of such position may properly be found to make further loss an avoidable consequence. Moreover, although the duty to mitigate does not require an employee to accept an offer of reinstatement where that offer is conditional on the employee abandoning his claim for compensation to the date

of reinstatement (see, for example, *Sonic Transport Systems Limited*, [1981] OLRB Rep. Oct. 1483, and *Shindler v. Northern Raincoat Co. Ltd.*, *supra*), we are satisfied that the respondent's offer to reinstate the grievors, which expressly stated that by returning to work they would not prejudice or abandon any claim for compensation before the Board, provided the grievors with a reasonable opportunity to eliminate further losses and obtain in advance part of the relief to which they might ultimately be entitled by Board order. While the full vindication of the grievors would have to await the Board's decision in these proceedings, the possibility of bringing before the Board further unfair labour practice allegations or complaints would provide the reinstated grievors with adequate protection against further unfair labour practices by the respondent pending a Board decision in this matter. Moreover, adoption by the Board of a policy of encouraging grievors to await the Board's disposition of unfair labour practice proceedings before accepting reinstatement could discourage full or partial settlement of such complaints, while encouraging prolonged litigation with respect to same. Furthermore, acceptance of such offer is in the employee's best interest in that it expedites his or her return to active employment and provides reinstatement irrespective of the ultimate outcome of the proceedings before the Board.

34. In the United States, the National Labour Relations Board has held that an employer who offers in good faith to reinstate employees who have been illegally discharged for protected union activities thereby "tolls" its liability for back pay: see, for example, *A. W. Behney Construction Co.* (1976), 92 LRRM 1608; *American Enterprises Inc.*, (1972), 81 LRRM 1491; *National Screen Products Co.* (1964), 56 LRRM 1274; and *Ready Mix Concrete Company of Lawrence Kansas* (1963), 53 LRRM 1097. In the *National Screen Products* case, the N.L.R.B. found that a discriminatorily discharged employee was entitled to reinstatement with back pay only for two days between his discharge and his employer's offer of reinstatement where the employee rejected the reinstatement offer because of the employer's refusal to pay for the two days' work the employee had lost. In reaching that decision which "preserves the right of an unlawfully discharged employee to be restored to his original employment and at the same time protects the right of an employer to litigate its claim that it did not engage in unlawful conduct", the Board wrote:

"Indeed if an employee could lawfully reject a reinstatement offer in circumstances such as these, a respondent employer seeking to mitigate its backpay liability would be compelled to offer an employee allegedly discharged for discriminatory reasons reinstatement *with accrued backpay* and thus the employer's right to litigate the issue whether the discharge was unlawful would for all practical purposes be nullified."

Those observations apply with all the more force to a situation such as the present case in which Messrs. Molyneux, Bishop, and Duquette, through the applicant, contend that they are under no obligation to accept a bona fide offer of reinstatement unless it is accompanied not only by full backpay, but also by reinstatement of all of the other grievors with full compensation, an agreement that the respondent accepts the application of section 8 "to certify the union outright", an agreement to a posting and mailing, and an agreement to provide the applicant with "an opportunity to talk to employees in the plant for the purpose of soliciting their support and membership". It is neither reasonable nor desirable that an employer should be placed in a position where



the only way in which he could effectively minimize his potential liability to discharged employees would be to accede to virtually all of the union's remedial requests arising out of the matters to be determined by the Board.

35. For the foregoing reasons, the Board finds that Messrs. Molyneux, Bishop, and Duquette are entitled to be reinstated with compensation for all lost wages and benefits sustained through the respondent's violations of the Act from the date of their respective discharges to August 10, 1982, when they ought reasonably to have accepted reinstatement by the respondent.

36. Following his testimony before the Board on September 1, 1982 through which the union introduced and verified the aforementioned tape recording of Mr. Wilson's captive audience speech, Mr. Wood was laid off by the respondent effective October 13, 1982. When he was notified of that layoff on October 12, he was told by his supervisor, Don Strahan, that he was being laid off due to "shortage of material to run", but that the layoff would only continue for three days. Although Mr. Wood asked about the possibility of bumping someone in another area of the plant, he concurred with Mr. Strahan's opinion that "by the time they got through the paperwork, the three days would be up anyway". Accordingly, he "took the three day layoff" and elected not to pursue his bumping rights at that time. However, when Mr. Wood was subsequently informed by Mr. Strahan that the layoff would continue indefinitely due to the continuing shortage of work, Mr. Wood immediately sought to bump other employees with less seniority. The reasons given for the respondent's refusal to permit him to bump into positions in the wilcote department and the fabrication department for which he had sufficient experience and seniority were that the men at the back end of the wilcote line whom he sought to bump were "very efficient conscientious workers", and that although he had "high seniority", his fabrication department "work performance was not acceptable". However, having regard to all of the evidence, the Board finds that Mr. Wood was laid off and denied bumping opportunities in the wilcote department and the fabrication department at least in part because of his participation in these proceedings and his continued support for the applicant. Performance reviews completed less than a month before his layoff rated Mr. Wood as a "good steady worker". Moreover, his "work record" had never before been raised as a relevant consideration in respect of inter-departmental bumping on the previous occasions in which he had been permitted to bump from one department into another in order to avoid a layoff. Accordingly, we find that the respondent contravened sections 66 and 80(1) of the Act by laying off Mr. Wood effective October 13, 1982. We are satisfied, however, that Mr. Wilson did not have any involvement in the decision to lay off Mr. Wood or deny his requests to bump into other departments. Thus, while the respondent breached the Act through the actions of the lower level members of management involved in those decisions, that breach does not represent a further unlawful action by Mr. Wilson.

37. The respondent submits that Mr. Wood failed to duly mitigate his loss. On the first morning of his layoff, Mr. Strahan telephoned Mr. Wood and offered him a position at the "back end of #4 mill". However, Mr. Wood expressed a concern that he would be unable to adequately perform that job because of the length of time which had elapsed since he had last operated it. Mr. Strahan obviously accepted that concern as being valid since he immediately offered Mr. Wood work on the "tube mill dip tank". Mr. Wood refused that position because it was a "dirty, messy job". Under the circumstances, we do

not find Mr. Wood's refusal to be unreasonable. At the time he had reason to believe that his layoff would only continue for two more days. Moreover, his duty to mitigate his loss did not require him to accept a job that was substantially inferior to the job to which his seniority and experience entitled him under the respondent's normal layoff and bumping procedures. Accordingly, we reject the respondent's contention that Mr. Wood's damages should be reduced by the amount which he might have earned at the "back end of #4 mill" or on the "tube mill dip tank".

38. The union also alleges that the respondent contravened the Act by suspending Dan Matthys for three days on June 4, 1982 and by giving him a written warning on June 11th. Although Mr. Matthys attended some union organizational meetings and signed a few employees into the union, there is no cogent evidence from which it may reasonably be inferred that management was aware of his union activities. Moreover, the respondent has satisfied the Board that the aforementioned disciplinary action was imposed solely due to misconduct on the part of Mr. Matthys, and was not tainted by any anti-union motivation. If, as alleged by the union, management was attempting to penalize Mr. Matthys for his union activities, it is most improbable that Mr. Matthys would merely have been given a written warning, rather than a discharge or a substantial suspension, for failing to report for scheduled overtime as a result of excessive drinking on the night before.

39. There were many layoffs at the respondent's London plant during the period encompassed by the present complaint. In May of 1982, the respondent employed 189 hourly employees in London. By July that number had fallen to 122. It increased to 159 in August but then fell to 123 in September, 101 in October and November, and 72 in December. The union has alleged that a number of those layoffs were implemented by the respondent in contravention of the Act. In view of the threats contained in Mr. Wilson's aforementioned speeches, a very heavy onus rests on the respondent to demonstrate that the impugned layoffs were not in any way motivated by anti-union considerations. However, we are satisfied that in the circumstances of this case, the respondent has discharged that onus. During the period in question, comparable layoffs occurred at the respondent's Glencoe plant in respect of which there is no evidence of any union organizational activities. Indeed, the evidence indicates that the number of hourly employees at the respondent's Glencoe Division fell from 50 in May of 1982 to 13 in December of that year. Moreover, managerial and clerical employees at the London plant have also experienced reductions in hours and layoffs due to lack of work. The respondent suffered severe reductions in orders due to the depressed state of the automotive industry and due to its substantial loss of business from its major customer, General Motors, as a result of serious quality problems at its London plant. We are also satisfied that with the exception of the aforementioned layoff of Dan Wood, anti-union considerations did not influence management in their selection of the particular employees to be laid off, which selection was based exclusively on seniority, ability, and past work performance.

40. The union has also alleged that certain other actions by the respondent contravened the Act. However, the Board is satisfied on the basis of all the evidence and the submissions of the parties that those actions were devoid of any anti-union animus. In view of that finding, it is unnecessary to detail the evidence concerning those allegations.

41. As noted earlier in this decision, the applicant seeks certification without a representation vote pursuant to section 8 of the Act which provides:

“Where an employer or employers’ organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers’ organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of a trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.”

As has been noted by the Board in many cases, certification can be granted under that section only if three conditions are satisfied:

- (1) The respondent must have contravened the Act.
- (2) The contravention must have resulted in a situation in which the true wishes of the employees are not likely to be ascertained by a secret ballot vote.
- (3) The applicant must have membership support that, in the opinion of the Board, is adequate for the purposes of collective bargaining.

As indicated above, the respondent has contravened sections 64, 66, 70, and 80 of the Act. Moreover, the applicant has filed valid membership evidence in respect of over fifty per cent of the employees in the bargaining unit. Thus, there can be no doubt that the applicant has membership support adequate for the purposes of collective bargaining. However, it is also necessary to consider whether the respondent’s unfair labour practices have resulted in a situation in which the true wishes of the employees are not likely to be ascertained by a representation vote.

42. It was contended by counsel for the respondent that the Board should conclude that Mr. Wilson’s speeches and the discharge of the aforementioned grievors did not adversely affect the union’s organizing campaign since the union organizers collected more membership cards after those events than they had collected prior to them. The fact that some of the employees were willing to sign union cards following Mr. Wilson’s captive audience meetings with employees and following the discharge of some of the union organizers indicates that not all employees were so intimidated or unduly influenced by those actions as to be afraid to support the union. However, that fact does not provide the Board with any assurance that other employees were not prevented for expressing their true wishes by the unlawful statements made by Mr. Wilson at those meetings and by the three unlawful discharges. In that regard, the following observations made by the Board in *Brinks Canada Limited*, [1982] OLRB Rep. Aug. 1140, are quite apt:

“11. It would be difficult to imagine a more obvious violation of the Act by an employer to justify the granting of certification under section 8 of the Act. When an employer makes a threat which



effectively tells an employee that to choose a union is tantamount to choosing unemployment, the ability of the employee to exercise any free choice is obviously removed .... From the earliest cases since the introduction of section 8 into the Act, the Board has consistently found that direct threats to the job security of employees are violations of the Act which trigger the operation of section 8 of the Act. (*Dylex Ltd.* [1977] OLRB Rep. Sept. 562; *Radio Shack*, [1979] OLRB Rep. Mar. 248)”

Indeed, in the present case the respondent's violations were even more egregious since Mr. Wilson's threats, intimidation, and undue influence were followed immediately by the discharge of the aforementioned union organizers. See also *The Globe and Mail Division of Canadian Newspapers Company Limited*, [1982] OLRB Rep. Feb. 189, in which the Board wrote (at paragraph 60):

“The Board has found in a number of cases that the employer, in violating the Act, made threats to the continued job security of his employees conditional on whether the union succeeded in its attempt to become certified. In these cases, the Board concluded that the employer violation of the Act was such as to make it unlikely that the true wishes of the employees could be ascertained. An employee is unable to express his true wishes where he had been told by his employer, either expressly or impliedly, and had reason to believe, that the selection of a union may cause the company to reduce the scale of its operation or close down with an attendant reduction in the number of jobs. (See *Dylex Limited*, *supra*, *Lorraine Products (Canada) Ltd.*, [1977] OLRB Rep. Nov. 734, *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. April 338, *Straton Knitting Mills Limited* [1979] OLRB Rep. Aug. 801, *Somerville Belkin Industries Limited*, [1980] OLRB Rep. May 791 and *A. Stork and Sons Ltd.* [1981] OLRB Rep. April 419).”

43. Counsel for the respondent also contended that even if the true wishes of the employees could not have been ascertained in June of 1982, the passage of approximately one year since the impugned actions of the company makes it possible to now ascertain the true wishes of the employees through a representation vote. However, the Board is of the view that the effects of the respondent's unfair labour practices have not likely been eradicated by the passage of time in the circumstances of this case. During that period there have been massive layoffs of the respondent's employees. Although we have concluded on the balance of probabilities that those layoffs (with the exception of the layoff of Dan Wood) were not in fact motivated by anti-union animus, it would be naive to think that the Board's finding in that regard would totally erase from the minds of the respondent's workforce the fear, instilled by Mr. Wilson's aforementioned illegal speeches, that voting for the certification of the union could prompt the respondent to lay off further employees or refrain from recalling employees. Moreover, the respondent's anti-union activities did not conclude in the spring of 1982. In the fall of that year the respondent again contravened the Act, albeit through the actions of members of management other than Mr. Wilson, by laying off Dan Wood and denying him bumping opportunities at least in part because of his participation in these proceedings and his continued support for the applicant.

44. Similarly, the respondent's defence is not advanced by the fact that Mr. Meneghini erroneously estimated that there were only 175 employees in the bargaining unit at the time of the application, rather than 185. The evidence does not indicate that the union in any way reduced its organizing activities because of a belief that they had signed up over fifty-five per cent of the employees. To the contrary, the evidence indicates that the union's organizing efforts continued unabated right up to the terminal date, at which time Mr. Meneghini was unsure whether the union had filed enough cards to obtain certification without a vote.

45. As noted by counsel for the respondent, the Board has refused in a number of cases to grant certification without a vote where it is satisfied that remedies granted under section 89 would likely be sufficient to restore the atmosphere existing prior to the respondent's contraventions of the Act. See, for example, *Charterways Transportation Limited*, [1982] OLRB Rep. Apr. 552; *Upper Canadian Furniture Limited*, [1982] OLRB Rep. July 1016; *Homeware Industries Limited*, [1981] OLRB Rep. Feb. 164; *Simcoe Manor Home for the Aged*, [1980] OLRB Rep. Nov. 1696; and *District of Algoma Home for the Aged (Algoma Manor)*, [1979] OLRB Rep. Apr. 269. However, none of those cases involved a situation where, as in the present case, the employer through its chief executive officer flagrantly violated the Act during the union's organizing campaign by threatening the job security of his employees generally and illegally discharging three of the union's organizers. Moreover, the respondent's illegal layoff of Dan Wood for his active participation in these proceedings is the type of conduct which could well undermine the confidence of the respondent's employees in the "rule of law".

46. Having regard to all of the circumstances, the Board finds that all of the elements of section 8 have been established in these proceedings and that this is an eminently proper case in which to grant certification without a vote pursuant to that provision.

47. Having regard to the agreement of the parties, the Board finds that all employees of the respondent at London, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining. For the purpose of clarity, the Board notes the agreement of the parties that Sandy Clapton and Betty Bauman are excluded from the bargaining unit.

48. A certificate will issue to the applicant with respect to that bargaining unit, pursuant to section 8 of the Act.

49. Before specifying the relief which is to be granted under section 89 of the Act in respect of these proceedings, the Board notes that on April 13, 1983, the union filed a further section 89 complaint with the Board (File Number 0080-83-U) in which it is alleged that the respondent has contravened various sections of the Act by announcing a decision to incorporate a new company and move most of Wilco's London equipment to St. Mary's for use by that new company. A letter dated April 11, 1983 was also filed with the Board (in the present proceedings) in respect of those new allegations. On April 14, 1983 at the commencement of his final argument in these proceedings, union counsel drew the Board's attention to that letter and to the new complaint, and requested the

Board to “take cognizance of this latest manoeuvre on the part of the respondent” in fashioning remedies and describing the bargaining unit in the present proceedings. However, as indicated by the Board at that time, we are of the view that it would not be appropriate for the Board to take into account any of those new allegations at this stage of the present proceedings since no evidence concerning the allegations contained therein has yet been heard. Counsel for the union did not seek to adduce any such evidence in the present proceedings but rather indicated that he would argue the case on the basis of the allegations contained in the original complaints, without prejudice to his right to subsequently proceed with the new complaint after the Board has rendered its decision in the instant case. In accordance with its normal practice, the Board will remain seized of the instant proceedings in the event that a dispute arises concerning the implementation of the Board’s order. Moreover, the Board has the power, under section 106(1) of the Act, to reconsider its decision or order in this case, and to vary or revoke them in the event that events render it appropriate to do so. It would also seem appropriate, as suggested by counsel for each of the parties, for the aforementioned new complaint to be scheduled for hearing before the present panel in the event that the parties are unable to resolve the matters raised therein.

50. As reflected in a number of decisions, the Board has recognized that the issuance of a certificate under section 8 will often not by itself suffice to place the applicant in the position that it would have been in if the respondent had not contravened the Act. This is particularly true where, as in the present case, the respondent has engaged in flagrant violations of the Act by threatening employees’ job security generally and discharging several union organizers. In such circumstances, it is appropriate for the Board to exercise its remedial jurisdiction under section 89 of the Act not only to reinstate those individuals with appropriate compensation, but also to attempt to establish conditions that will promote fuller employee participation and understanding with a view to producing a more constructive climate for the exercise of the collective bargaining rights which will flow from these proceedings. Failure to do so would risk consigning the section 8 certificate to a climate where a collective agreement could be difficult, if not impossible, to realize. (See, for example, *Manor Cleaners Limited*, *supra*; *Robin Hood Multi-foods Inc.*, [1981], OLRB Rep. July 1972; and *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Jan. 60.) Accordingly, in addition to directing reinstatement of Messrs. Molyneux, Bishop, and Duquette, and recall of Dan Wood, with compensation (to the extent indicated above), the Board finds it appropriate to direct the respondent to provide the union with employee lists, to permit union representatives to meet with employees on each of its shifts for a maximum of one hour on company premises during working hours, and to provide the union with access to employee bulletin boards. In view of the large number of layoffs which have occurred during the course of these proceedings, we also find it appropriate to supplement our usual “posting” order with a “mailing” to ensure that all bargaining employees will receive notice of the Board’s decision in this matter.

51. For the reasons set forth above, the Board declares that the respondent has contravened section 64, 66, 70, and 80 of the *Labour Relations Act*, and orders that the respondent:

- (1) reinstate Ron Molyneux, Chris Bishop, and Frank Duquette forthwith and compensate them for all lost wages and benefits



sustained through the respondent's violation of the Act from the date of their respective discharges to August 10, 1982;

(2) recall Dan Wood forthwith and compensate him for all lost wages and benefits sustained through the respondent's violation of the Act;

(3) pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in Practice Note 13 dated September 8, 1980;

(4) provide the applicant forthwith with a list of names and addresses of all employees in the bargaining unit and with a list of names and addresses of all bargaining unit employees who are on layoff, and keep the lists updated on a monthly basis for one year or until the union has entered into a collective agreement with the respondent, whichever shall first occur;

(5) permit the applicant access to its plant during working hours for the purpose of convening a meeting for a maximum of one hour on each shift to address bargaining unit employees out of the presence of any member of management;

(6) provide the applicant for a period of one year from the date hereof, with reasonable access to all employee notice boards in its plant (and cafeteria) for the posting of union notices (including notice of the aforementioned meetings), bulletins and other union business literature, to allow the employees ready access to information from the union concerning all aspects of the employees' representation, including collective bargaining with their employer;

(7) post copies of the attached notice, marked "Appendix", after being duly signed by its President, in conspicuous places in its plant and cafeteria, where they are likely to come to the attention of employees, and keep the notices posted for sixty consecutive working days; reasonable steps shall be taken by the respondent to ensure that the said notices are not altered, defaced or covered by any other material; reasonable physical access to the premises shall be given by the respondent to a representative of the applicant so that the applicant can satisfy itself that this posting requirement is being complied with; and

(8) at its own expense, mail a copy of the attached notice marked "Appendix", after being duly signed by its President, to the residence of each bargaining unit employee employed at its London plant at any time during the period from May 25, 1982 to the date of this decision, including all such employees who have been laid off by the respondent.

52. The Board remains seized of this matter in the event that a dispute arises concerning the implementation of the Board's order.

53. Accordingly, the union's application for certification in File No. 0471-82-R is granted, as are its complaints in File Nos. 0436-82-U, 0511-82-U, and 1279-82-U, to the extent indicated above.

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Appendix  
The Labour Relations Act

# NOTICE TO EMPLOYEES

## Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A SERIES OF HEARINGS ARISING OUT OF THE EFFORTS OF THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA TO BECOME THE COLLECTIVE BARGAINING AGENT FOR OUR EMPLOYEES. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY HOLDING CAPTIVE AUDIENCE MEETINGS WITH OUR EMPLOYEES AT WHICH WE THREATENED, INTIMIDATED AND UNDULY INFLUENCED EMPLOYEES, BY DISCHARGING UNION ORGANIZERS RON MOLYNEUX, CHRIS BISHOP AND FRANK DUQUETTE, AND BY LAYING OFF DAN WOOD. THE BOARD HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS:

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION,
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING,
- TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS;

WE WILL REINSTATE RON MOLYNEUX, CHRIS BISHOP AND FRANK DUQUETTE, AND RECALL DAN WOOD, WITH COMPENSATION AND INTEREST AS DIRECTED BY THE BOARD;

WE WILL PROVIDE THE UNION WITH A LIST OF NAMES AND ADDRESSES OF ALL EMPLOYEES IN THE BARGAINING UNIT AND WILL KEEP THE LIST UPDATED ON A MONTHLY BASIS FOR ONE YEAR OR UNTIL WE HAVE ENTERED INTO A COLLECTIVE AGREEMENT WITH THE UNION, WHICHEVER SHALL FIRST OCCUR;

WE WILL PROVIDE THE UNION WITH ACCESS TO OUR PLANT DURING WORKING HOURS FOR THE PURPOSE OF CONVENING A MEETING FOR A MAXIMUM OF ONE HOUR ON EACH SHIFT TO ADDRESS BARGAINING UNIT EMPLOYEES OUT OF THE PRESENCE OF ANY MEMBER OF MANAGEMENT,

WE WILL PROVIDE THE UNION FOR A PERIOD OF ONE YEAR WITH REASONABLE ACCESS TO ALL EMPLOYEE NOTICE BOARDS IN OUR PLANT (AND CAFETERIA) FOR THE POSTING OF UNION NOTICES, BULLETINS AND OTHER UNION BUSINESS LITERATURE,

WE WILL MAIL AT OUR OWN EXPENSE A COPY OF THIS NOTICE TO THE RESIDENCE OF EACH BARGAINING UNIT EMPLOYEE EMPLOYED BY US AT OUR LONDON PLANT AT ANY TIME DURING THE PERIOD FROM MAY 25, 1982 TO THE DATE OF THE BOARD'S DECISION IN THIS MATTER. WE WILL, UPON BEING GIVEN WRITTEN NOTICE TO BARGAIN, BARGAIN IN GOOD FAITH WITH THE UNION AS THE DULY CERTIFIED BARGAINING REPRESENTATIVE OF OUR EMPLOYEES IN THE BARGAINING UNIT, AND WILL MAKE EVERY REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT.

WILCO-CANADA INC.  
PER:

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PRESIDENT

**This is an official notice of the Board and must not be removed or defaced.**

**This notice must remain posted for 60 consecutive working days.**

DATED this 3rd day of June, 1983.







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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1983

### BARGAINING AGENTS CERTIFIED

#### No Vote Conducted

**0380-82-R:** Canadian Union of Public Employees, (Applicant) v. St. Joseph's Villa, (Respondent).

Unit: "all employees of the respondent in the City of Cornwall, save and except professional medical staff, registered and graduate nurses, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (104 employees in unit). (*Having regard to the agreement of the parties*)

**1273-82-R:** International Brotherhood of Painters and Allied Trades - Local 1819 - Glaziers, (Applicant) v. C T Windows Limited, (Respondent).

Unit #1: "all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all glaziers and glaziers' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**1287-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Nu-West Development Corporation Ltd., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

**1587-82-R:** Local 47 Sheet Metal Workers' International Association, (Applicant) v. Ray Matte Enrg. Couvreur, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent engaged in roofing in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all employees of the respondent engaged in roofing in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**1791-82-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, (Applicant) v. The Board of Education for the City of Windsor, (Respondent) v. Canadian Union of Public Employees, (Intervener).

Unit #1: "all plumbers and plumbers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Unit #2: "all plumbers and plumbers' apprentices in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

**1888-82-R:** The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local #58, Toronto, (Applicant) v. Canadian National Exhibition Association, (Respondent) v. Labourers' International Union of North America, Local 506, (Intervener).

Unit: "all stage employees of the respondent in the City of Toronto, save and except, foremen, persons above the rank of foremen, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons covered by a subsisting collective agreement between the applicant and respondent." (5 employees in unit).

**2426-82-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Lo Food Division of Lumsden Brothers Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the City of Hamilton, Ontario, save and except store manager, persons above the rank of store manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (17 employees in unit).

Unit #2: "all employees of the respondent in the City of Hamilton, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except store manager and persons above the rank of store manager." (3 employees in unit).

**2615-82-R:** Service Employees Union, Local 204, Affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Heutinck Nursing Home Ltd. (Hilltop Manor), (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Cambridge, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff and persons covered by a subsisting collective agreement between the applicant and the respondent." (45 employees in unit). (*Having regard to the agreement of the parties*).

**2645-82-R:** Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC, (Applicant) v. Meadow Park Nursing Home, (Respondent).

Unit: "all employees of the respondent in Chatham, save and except professional medical staff, registered and graduate nurses, Activity Director, supervisors, persons above the rank of supervisor, office staff and paramedical personnel." (51 employees in unit).

**2688-82-R:** The Canadian Union of Public Employees, (Applicant) v. Marnwood Hourse (Bowmanville), (Respondent).

Unit #1: (*See Bargaining Agents Certified Subsequent to a Post Hearing Vote*).



Unit #2: "all employees of the respondent in Bowmanville, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except registered and graduate nurses, office employees, supervisors and persons above the rank of supervisor." (33 employees in the unit). (*Having regard to the agreement of the parties*).

**2724-82-R:** Hotels, Clubs, Restaurants and Tavern Employees Union, Local 261, (Applicant) v. The Mill Restaurant, (Respondent).

Unit #1: "all employees of the respondent in Ottawa, save and except assistant chefs and assistant managers and persons above the rank of assistant chef and assistant manager, hostesses, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (22 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in Ottawa regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except assistant chefs and assistant managers, persons above the rank of assistant chef and assistant manager, and hostesses." (15 employees in unit). (*Having regard to the agreement of the parties*).

**2735-82-R:** Canadian Union of Public Employees, Local 79, (Applicant) v. The Municipality of Metropolitan Toronto, (Respondent).

Unit: "all employees of the respondent in its Homes for the Aged in the Province of Ontario save and except Dietary Supervisor, Housekeeper, Assistant Administrator, persons above the rank of Dietary Supervisor, Housekeeper, Assistant Administrator, persons covered by subsisting collective agreements between the respondent and CUPE, Locals 79 and 43, and persons working for fewer than 40 hours per week performing duties which are the same as the duties performed by persons covered by the subsisting collective agreement between the respondent and CUPE, Local 43." (891 employees in unit). (*Having regard to the agreement of the parties*).

**2736-82-R:** The Canadian Association of Passenger Agents, (Applicant) v. International Vacations Ltd., (Respondent) v. Group of Objectors, (Objectors).

Unit #1: "all office, clerical and inside sales employees of the respondent in Mississauga save and except supervisors, persons above the rank of supervisor, secretaries to the Reservations Manager, Sales Manager, Director of Financial Operations, Director of Commercial Sales, Director of Passenger Sales, and Vice-President Marketing, data centre employees, accounting department employees, outside sales employees, marketing department employees, cafeteria employees, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (75 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all office, clerical and inside sales employees of the respondent in Mississauga regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, secretaries to the Reservations Manager, Sales Manager, Director of Financial Operations, Director of Commercial Sales, Director of Passenger Sales, and Vice-President of Marketing, data centre employees, accounting department employees, outside sales employees, marketing department employees and cafeteria employees." (28 employees in unit). (*Having regard to the agreement of the parties*).

**2769-82-R:** Retail, Commercial & Industrial Union, Local 206, chartered by the United Food and Commercial Workers International Union, (Applicant) v. D'Allaird's (a division of Marks and Spencer (Canada) Inc.), (Respondent) v. Group of Employees, (Objectors).

Unit #1: (*See Bargaining Agents Dismissed Subsequent to a Post Hearing Vote*).

Unit #2: "all employees of the respondent in the Regional Municipality of Waterloo regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except manager and persons above the rank of manager." (13 employees in unit). (*Having regard to the agreement of the parties*).

**0056-83-R:** Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. OK Parking Service (Division of Oxford Development Group Ltd.), (Respondent).

Unit #1: "all employees of the respondent at 145 Richmond Street West, 181 University Avenue and 150 York Street, Toronto, save and except manager, supervisors, persons above the rank of supervisor, office and sale staff, accounting staff, students employed during the school vacation period and persons regularly employed for not more twenty-four (24) hours per week." (5 employees in unit). (*Having regard to the agreement of the parties*).

Unit#2: "all employees of the respondent at 145 Richmond Street West, 181 University Avenue and 150 York Street, Toronto, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except manager, supervisors, persons above the rank of supervisor, office and sales staff and accounting staff." (8 employees in unit). (*Having regard to the agreement of the parties*).

**0057-83-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Runnymede Development Corporation Limited, (Respondent) v. Labourers' International Union of North America, Local 506, (Intervener).

Unit: "all construction labourers' in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in the unit).

**0073-83-R:** Grant Waferboard Employees Association, (Applicant) v. Grant Lumber Company Limited and J.M. Grant Contractors Limited carrying on business under the firm name and style of Grant Waferboard, (Respondent).

Unit: "all employees of the respondent in Englehart, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (10 employees in unit). (*Having regard to the agreement of the parties*).

**0105-83-R:** Local Union 586, International Brotherhood of Electrical Workers, (Applicant) v. Union Electric Supply Co. Limited, (Respondent).

Unit: "all office clerical employees of the respondent in the City of Ottawa, save and except the lighting supervisor, confidential secretary to the general manager, purchasing supervisor, credit manager, accountant, assistant district manager and salesmen." (10 employees in unit).

**0106-83-R:** The Canadian Union of Public Employees, (Applicant) v. Canadian Red Cross Society, Ontario Division, Minden Red Cross Hospital, (Respondent).

Unit #1: "all employees of the respondent at its hospital in Minden, Ontario, save and except professional medical staff, registered and graduate nurses, paramedical personnel, office and clerical staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (8 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent at its hospital in Minden, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, registered and graduate nurses, paramedical personnel, office and clerical staff, supervisors and persons above the rank of supervisor." (5 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0107-83-R:** Christian Labour Association of Canada, (Applicant) v. Maple City Residence Ltd., (Respondent).

Unit #1: "all employees of the respondent in Chatham, Ontario, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (16 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in Chatham, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor and office and clerical staff." (7 employees in unit). (*Having regard to the agreement of the parties*).

**0134-83-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. The David S. Black Construction Co. /a divn of 428824 Ont. Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0159-83-R:** The Canadian Association of Passenger Agents, (Applicant) v. International Vacations Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except supervisors and persons above the rank of supervisor." (4 employees in unit). (*Having regard to the agreement of the parties*).

**0164-83-R:** Labourers' International Union of North America, Local 183, (Applicant) v. York Condominium Corporation No. 289, (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 4091 and 4101 Sheppard Avenue East, Scarborough, Ontario, including resident superintendents, save and except property manager and office and sales staff." (4 employees in the unit). (*Having regard to the agreement of the parties*).

**0174-83-R:** Canadian Union of Public Employees, (Applicant) v. The Doctors' Hospital, (Respondent).

Unit: "all employees of the respondent in Toronto, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate



pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, office and clerical personnel, supervisors, persons above the rank of supervisor." (36 employees in unit). (*Having regard to the agreement of the parties*).

**0182-83-R:** Ontario Nurses' Association, (Applicant) v. Vernon Nursing Home Services Limited (Fairvern Nursing Home), (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at Huntsville, Ontario, save and except the director of nursing and persons above the rank of director of nursing." (6 employees in unit). (*Having regard to the agreement of the parties*).

**0202-83-R:** Ontario Public Service Employees' Union, (Applicant) v. Metropolitan Toronto-York Bail Program, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, save and except confidential secretary to the director, manager, persons above the rank of manager and students employed during the school vacation period." (24 employees in unit). (*Having regard to the agreement of the parties*).

**0210-83-R:** Kingston Typographical Union, Local 204 (I.T.U.), (Applicant) v. Kingston Whig Standard Co. Ltd., (Respondent).

Unit #1: "all employees of the respondent regularly employed for not more than twenty-four hours per week in the City of Kingston and at the district bureaus employed in news and editorial related work save and except department heads and those above the rank of department head." (57 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four hours per week in the mailing room department in the City of Kingston save and except managers and those above the rank of manager." (57 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0218-83-R:** International Union of Bricklayers and Allied Craftsmen Local Union No. 7, (Applicant) v. Joe Arban Contractor Limited, (Respondent).

Unit #1: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial, and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**0247-83-R:** Union of Labour Representatives of Ontario, (Applicant) v. The Ottawa-Carleton Public Employees' Union, Local 503, Canadian Union of Public Employees, C.L.C., (Respondent).

Unit: "all employees of the respondent save and except persons who exercise managerial functions." (8 employees in unit). (*Having regard to the agreement of the parties*).

**0248-83-R:** United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Kolody Contracting Company Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foremen." (3 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0257-83-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Drug World Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at London, Ontario, save and except assistant manager, persons above the rank of assistant manager, pharmacists, office staff and persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (2 employee in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at London, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant manager, persons above the rank of assistant manager, pharmacists and office staff." (2 employees in unit). (*Having regard to the agreement of the parties*).

**0264-83-R:** Teamsters' Union, Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Intermar Surveys Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Oshawa, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*).

**0265-83-R:** United Brotherhood of Carpenters and Joiners of America Local Union 1669, (Applicant) v. The Corporation of the Town of Keewatin, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen." (5 employees in unit).

**0279-83-R:** International Union of Operation Engineers, Local 793, (Applicant) v. G. Lavictoire and Brothers Ltd., (Respondent).

Unit #1: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**0311-83-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Gendrain Construction Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all employees of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic township of Nassagaweya, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**0316-83-R** Ontario Nurses' Association, (Applicant) v. The Ontario Cancer Treatment and Research Foundation, known as the Ontario Cancer Foundation, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent employed in a nursing capacity as its Hamilton clinic in Hamilton, Ontario save and except the nursing administrator and persons above the rank of nursing administrator." (16 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0329-83-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Concorde Square Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**0321-83-R:** Retail, Wholesale, and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Jessel Foods Limited, (Respondent).

Unit: "all employees of the respondent at Timmins, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except branch manager, foremen, salesmen, office staff and persons covered by a subsisting collective agreement." (6 employees in unit). (*Having regard to the agreement of the parties*).

**0344-83-R:** Labourers' International Union of North America, Local 527, (Applicant) v. H. Cohen & Co. Ltd., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial, and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foremen." (10 employees in unit).



Unit #2: “all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial, and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (10 employees in unit).

**Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**2439-82-R:** United Electrical, Radio & Machine Workers of America, (UE), (Applicant) v. Westinghouse Canada Inc., (Respondent)

Unit: “all employees of the respondent in the Town of Mount Forest, Ontario, save and except unit managers, supervisors, persons above the rank of unit manager or supervisor, office, clerical, sales, and engineering staff.” (101 employees in unit).

Number of names of persons on list as originally prepared by employer;	106	
Number of persons who cast ballots	103	
Number of ballots marked in favour of applicant		68
Number of ballots marked against applicant		31
Ballots segregated and not counted		4

**2452-82-R:** Jack Colden Ltd. Employee Association, (Applicant) v. Jack Colden Limited, (Respondent) v. United Food and Commercial Workers International Union, Local 1000A, (Intervener).

Unit: “all employees of the respondent at its store in Kingston West, Ontario, save and except department managers, persons above the rank of department manager, and office staff.” (108 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		106
Number of persons who cast ballots	96	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant	162	
Number of ballots marked in favour of intervener	133	

**2719-82-R:** United Electrical, Radio & Machine Workers of America (UE), (Applicant) v. Haugh’s Products Ltd., (Respondent).

Unit: “all employees of the respondent in the City of Brampton, save and except foremen, persons above the rank of foreman, office and sales staff.” (41 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		43
Number of persons who cast ballots	41	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		23
Number of ballots marked against applicant		17

**0140-83-R:** United Headwear, Optical and Allied Workers Union of Canada, Local 4, (Applicant) v. Imperial Optical Company Ltd., (Respondent).

Unit: “all laboratory employees of the respondent in its prescription laboratories in Metropolitan Toronto save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (101 employees in unit).

Number of names of persons on revised voters' list		124
Number of persons who cast ballots'	98	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		94
Number of ballots marked in favour of intervener		3

### Bargaining Agents Certified Subsequent to a Post-Hearing Vote

**0769-81-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Raf-Tar Construction Ltd., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on revised voters' list		9
Number of persons who cast ballots	7	
Number of spoiled ballots		1
Number of ballots marked in favour of Carpenters' Local 1190	1	
Number of ballots marked in favour of Labourers' Local 183		5

**2655-82-R:** United Electrical, Radio & Machine Workers of America (UE), (Applicant) v. G.K.L. Industries Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Peterborough, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (32 employees in unit). (*Having regard to the agreement of the parties*).

Number of names on revised voters' list		29
Number of persons who cast ballots	29	
Number of ballots marked in favour of applicant		17
Number of ballots marked against applicant		10
Ballots segregated and not counted		2

**2688-82-R:** The Canadian Union of Public Employees, (Applicant) v. Marnwood House (Bowmanville), Respondent.

Unit #1: "all employees of the respondent in Bowmanville, Ontario, save and except registered and graduate nurses, office employees, supervisors and persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (2 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Bargaining Agents Certified - No Vote Conducted*).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		0

## Applications for Certification Dismissed – No Vote Conducted

**2306-82-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Q-Sons Construction Company Limited and Canson Structures Inc., (Respondents) v. Toronto-General Ontario Building and Construction Trades Council, (Intervener). (13 employees in unit).

**2711-82-R:** Hotel & Restaurant Employees & Bartenders International Union, Local 75, (Applicant) v. Inntowner Motor Hotel, (Respondent). (42 employees in unit).

## Application for Certification Dismissed Subsequent to a Pre-Hearing Vote

**0055-83-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Goodhost Foods Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (40 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		49
Number of persons who cast ballots	49	
Number of ballots marked in favour of applicant		14
Number of ballots marked against applicant		35

## Applications for Certification Dismisses Subsequent to a Post-Hearing Vote

**0853-81-R:** United Brotherhood of Carpenters and Joiners of America – Local 1190, (Applicant) v. Raf-Tar Construction Ltd., (Respondent) v. The Labourers' International Union of North America, Local 183, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the regional Municipality of York and the County of Peel, the Township of Esquimes and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	7	
Number of spoiled ballots		1
Number of ballots marked in favour of Carpenters' Local 1190		1
Number of ballots marked in favour of Labourers' Local 183	15	

**2286-81-R:** United Brotherhood of Carpenters and Joiners of America, Local 249, (Applicant) v. R & H Doornekamp Sons Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear and Leeds and Landsdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (29 employees in unit).



Number of names of persons on list as originally prepared by employer		3
Number persons who cast ballots	3	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		3

**2601-82-R:** United Steelworkers of America, (Applicant) v. Donlee Nuclear Division of Donlee Manufacturing Industries Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (55 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		54
Number of persons who cast ballots	53	
Number of ballots marked in favour of applicant		15
Number of ballots marked against applicant		36
Ballots segregated and not counted		2

**2769-82-R** Retail, Commercial & Industrial Union, Local 206, chartered by the United Food & Commercial Workers International Union, (Applicant) v. D'Allaird's (a division of Marks and Spencer (Canada) Inc.), (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Regional Municipality of Waterloo regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except manager and persons above the rank of manager." (4 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		2

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**0024-83-R:** Labourers' International Union of North America, Local 493, (Applicant) v. National Industrial Maintenance Ltd., (Respondent).

**0137-83-R:** International Union of Allied, Novelty and Production Workers, Local 905, (Applicant) v. Ganz Bros. Toys Ltd., (Respondent).

**0231-83-R:** Carleton Roman Catholic Separate School Boards Employees' Association, (Applicant) v. Carleton Roman Catholic Separate School Board, (Respondent) v. Canadian Union of Public Employees, (Intervener).

**0236-83-R:** United Garment Workers of America, (Applicant) v. Ontario Publications Limited, (Respondent).

**0246-83-R:** Hotel Employees Restaurant Employees' Union, Local 75, (Applicant) v. Rill Foodservices Ltd. (Glendon Campus Cafeteria), (Respondent).

**0274-83-R:** Labourers' International Union of North America, Local 607, (Applicant) v. LeBrun Bruno Joint Venture Ltd., (Respondent).

**0326-83-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Durwes Contracting Ltd., (Respondent).

**2478-82-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Dupont Contracting & Engineering Ltd., Petroleum Division Canadian Tire Corporation, Limited, (Respondents) v. Group of Employees, (Objectors).

**2745-82-R:** International Brotherhood of Electrical Workers, Local Union 105, (Applicant) v. Tom Harris Incorporated, (Respondent).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**2010-81-R:** United Steelworkers of America, (Applicant) v. Securicor Investigation and Security Ltd., (Respondent). (*Granted*).

**2224-82-R:** Christian Labour Association of Canada, (Applicant) v. Stephen and Rankin Inc. and D.L. Stephens Contracting Niagara Limited, (Respondents). (*Withdrawn*).

**2435-82-R:** Amalgamated Clothing and Textile Workers' Union, Toronto Joint Board, (Applicant) v. 529592 Ontario Limited Carrying on Business as Shiffer-Hillman Clothes, (Respondent). (*Dismissed*).

**0244-83-R:** United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Ramo Carpentry Co. Ltd. and Lomo Carpentry Company Ltd., (Respondents). (*Withdrawn*).

## SALE OF A BUSINESS

**1562-82-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Silver and Kircher Limited, Trio Builders, (Respondents). (*Dismissed*).

**2223-82-R:** Christian Labour Association of Canada, (Applicant) v. Stephens and Rankin Inc. and D.L. Stephens Contracting Niagara Limited, (Respondents). (*Withdrawn*).

**2425-82-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Capital Paving, a Division of D. L. Stephens Contracting Niagara Limited, (Respondent). (*Granted*).

**2435-82-R:** Amalgamated Clothing and Textile Workers' Union, Toronto Joint Board, (Applicant) v. 529592 Ontario Limited Carrying on Business as Shiffer-Hillman Clothes, (Respondent). (*Granted*).

**2555-82-R:** International Union of Bricklayers and Allied Craftsmen, Ontario Provincial Conference and the International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. Stephen Sura Inc., Stephen Sura (Canada) Ltd., (Respondents). (*Withdrawn*).

**2639-82-R:** Service Employees' Union, Local 183, (Applicant) v. Daynes Health Care Limited, (Respondents). (*Dismissed*).

**0168-83-R:** Service Employees' Union, Local 183, (Applicant) v. Hallowell House Limited, (Respondent). (*Withdrawn*).

**0245-83-R:** United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Ramo Carpentry Co. Ltd. and Lomo Carpentry Company Ltd., (Respondents). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**0207-82-R:** Brian Schade, (Applicant) v. Ontario Sheet Metal Workers' Conference, (Respondent) v. Culliton Brothers Limited, (Intervener).

Unit: "all journeymen and sheet metal apprentices in the employ of Culliton in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Number of names of persons on revised voters' list		5
Number of names of persons who cast ballots	5	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		5

**0259-82-R:** Gaetan Perreault, (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 2486, (Respondent) v. Roy Construction and Supply Company Limited, (Intervener). (16 employees in unit). (*Dismissed*).

**1082-82-R:** Brenda Millward, Lilian McFarland, (Applicants) v. Service Employees Union, Local 204, A.F.L., C.I.O., C.L.C., (Respondent) v. K Mart Canada Limited, (Intervener).

Unit: "all employees of the employer employed at its K-Mart store at Bayview Village Shopping Centre in the Municipality of Metropolitan Toronto, Ontario, save and except department managers, persons above the rank of department managers, management trainees, pharmacists, students employed during the school vacation period and persons who are regularly employed for not more than twenty-four (24) hours per week." (54 employees in unit).

Number of names of persons on list as originally prepared by employer		54
Number of persons who cast ballots	53	
Number of spoiled ballots		1
Number of ballots marked in favour of respondent		19
Number of ballots marked against respondent		29
Ballots segregated and not counted		4

**2526-82-R:** Linda Warner, (Applicant) v. Office and Professional Employees International Union, Local 343, (Respondent) v. Alex Smith, President Buntin Reid Paper, (Intervener).

Unit: "all employees of Buntin Reid Paper (Division of Domtar Inc.) located at its office in Toronto with the exception of the following:

- (1) Assistant Managers, persons above the rank of assistant managers;
- (2) Salesmen, order department supervisor, secretaries to the president and controller;
- (3) Persons covered by subsisting collective agreements between Buntin Reid Paper Division of Domtar Inc., and the Canadian Paperworkers Union, Local 1291;
- (4) Students employed during the school vacation period;
- (5) Temporary personnel.

A temporary employee is one who is hired for a work assignment of limited or pre-determined duration and shall include students and vacation relief." (56 employees in unit).



Number of names of persons on list as originally prepared by employer		57
Number of persons who cast ballots	55	
Number of ballots marked in favour of respondent		25
Number of ballots marked against respondent		30

**2580-82-R:** Joe Gasparik, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent) v. Bennett & Norgrove Limited, (Intervener).

Unit: "all field employees of Bennett's Norgrove Limited engaged in surveying operations in and out of Metropolitan Toronto save and except party chiefs, persons above the rank of party chief, draftsmen, sales, office and clerical staff and O.L.S. Articled students." (4 employees in unit).

Number of names of persons on revised voters' list		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		4

**2527-82-R:** Texaco Canada Inc., (Applicant) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 880, (Respondent).

Unit: "all truck drivers and warehousemen in the employ of the Company at its Windsor, Ontario Sales Terminal No. 70, save and except assistant agent and persons above that rank and office staff." (2 employees in unit). (*Terminated*).

**2757-82-R:** 101564 Ontario Limited (formerly Central Chevrolet Oldsmobile (London) Limited) a corporation incorporated under the laws of the Province of Ontario, carrying on business as Central Tire, (Applicant) v. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 27 U.A.W. - A.F.L. - C.I.O., (Respondent).

Unit: "all employees of 101564 Ontario Limited, carrying on business as Central Tire at London, save and except foremen, persons above the rank of foreman, and office and sales staff." (3 employees in unit). (*Granted*).

**2770-82-R:** Albert Chard, (Applicant) v. United Steelworkers of America, (Respondent) v. Standard Brass and Alum Foundry Ltd., (Intervener). (122 employees in unit). (*Dismissed*).

**2776-82-R:** H & R Mechanical Installations Limited, (Applicant) v. The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Respondent). (*Withdrawn*).

**0072-83-R:** Jill Mino and Margaret Robillard, (Applicants) v. Office & Professional Employees International Union, Local 343, (Respondents) v. Stelco Employees' (Primary Works) Credit Union Limited, (Intervener). (2 employees in unit). (*Granted*).

**0147-83-R:** Ronald William Lynn, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent). (2 employees in unit). (*Granted*).

**0170-83-R:** Cathy Hocking, (Applicant) v. The United Steel Workers of America, (Respondent).

Unit: "all office, clerical and technical employees of Ontario Telephone Answering Service, A Division of Ontario Safety and Communications Services Limited, in London, Ontario, save and except supervisors, persons above the rank of supervisor, sales staff and persons regularly employed for not more than twenty-four hours per week." (6 employees in unit). (*Granted*).

**0188-83-R:** Ideal Plumbing Supplies Inc., (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, (Respondent).

Unit: "all employees of Ideal Plumbing Supplies Inc., working in Ottawa, Ontario, save and except foremen, those above the rank of foreman, office and sales staff." (9 employees in unit). (*Granted*).

**0225-83-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Skycon Construction Ltd., (Respondent). (2 employees in unit). (*Dismissed*).

**0448-83-R:** Canadian Union of Operating Engineers and General Workers, (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario operation St. Joseph Hospital at Sarnia, Ontario, (Respondent). (9 employees in unit). (*Dismissed*).

## APPLICATION FOR DECLARATION OF UNLAWFUL STRIKE

**2658-82-U:** The Ottawa Board of Education, (Applicant) v. Ontario Secondary School Teachers Federation and others listed on Schedule "A", (Respondents). (*Dismissed*).

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**1800-81-U:** Mauri Ahokas, Dale Anderson, Gerry Bannon, Hale Beck, Gladys Berringer, John Bodnar, Janice Britton, Bruce Brown, James Buie, Kenneth Cannon, Douglas Carlson, Marcel Chedore, Angela Desserre, Salvatore Federico, William Fikis, Terry Flaherty, Joseph Fron, Robert Goods, Murray Graham, Susan Gross, Robert Heaslip, Edward Heintz, Martin Horvath, William Hughes, Stefan Huzan, Warren Johnson, Brian Johnstone, Eldred Kennedy, Shiela Kehres, Lyn Kislock, David Kozar, John Lebate, Reginald Legace, Harold Lemarquand, Melville Love, Catherine MacKenzie, Dennis Madge, Patrica Martineau, Brian Matson, Deborah Maunula, Norman Maki, Beverly Milnes, Carol Nesbitt, Glenn Niemi, Judy Opaloch, Frank Pasko, Kenneth Peterson, Kathryn Peterson, John Petrunka, Lawrence Pyorny, John Quinn, Mabel Quinn, Carolyn Ranta, Debra Reith, Clifford Riddell, Peter Robinson, Leonard Roy, Elaine Ruddy, Arthur Salo, Betty Shedden, Danny Siciliano, Kenneth Sinclair, Ian Smith, Lawrence Spooner, Barbara Stacey, Douglas Strahan, Desmond Stolz, Klaus Taskinen, Thomas Tod, Robert Thompson, Raymond Wataja, Kathryn Welch, Brenda Wisinger, Edward Zapior, Stanley Zapior, Betty Zimmerman, (Complainants) v. The Canadian Union of Public Employees, Local 87, Canadian Union of Public Employees, Grace Hartman, G. LeBel, Eileen Okerlund, William McFarlane, Gloria Welch, Arlene Parker, and Eileen Rice, (Respondents). (*Granted*).

**2011-81-U:** United Steelworkers of America and United Steelworkers of America, Local 7105, (Complainants) v. Securicor Investigations and Security Ltd., (Respondents). (*Granted*).

**0693-82-U:** Canadian Union of Public Employees, Local 907, (Complainant) v. Parking Authority of the City of Belleville, (Respondent). (*Dismissed*).

**1248-82-U:** Teamsters, Local 419, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. K Mart Canada Limited, (Respondent). (*Granted*).

**1255-82-U:** Mechanical Contractors Association Ontario, (Complainant) v. Honeywell Controls Ltd., Johnson Controls Ltd., United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Respondents) v. Canadian Pneumatic Control Contractors Association, (Intervener). (*Granted*).

**1884-82-U:** Hotel, Restaurant & Cafeteria Employees' Union, Local 75, (Complainant) v. Hotel Brampton, (Respondent). (*Withdrawn*).

**2236-82-U:** Melvin Runchey, member of Local 1005 USWA, (Complainant) v. Cec Taylor, President, Local 1005 USWA, Len Taylor, Grievance Chairman, Local 1005 USWA, (Respondent) v. Stelco Inc., (Intervener). (*Dismissed*).

**2424-82-U:** United Food and Commercial Workers International Union, Local 1105P, (Complainant) v. Maple Lodge Farms Ltd., (Respondent). (*Withdrawn*).

**2493-82-U:** Mr. Allan J. Senter, Mr. John Kulik, Mr. Roy Edey, Mr. Ronald Smith, (Complainant) v. The United Steelworkers of America, (Respondent) v. INCO Limited, (Intervener). (*Withdrawn*).

**2496-82-U:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Worker, (Complainant) v. Pepsi-Canada Ltd., (Respondent). (*Withdrawn*).

**2532-82-U:** John Connoy, (Complainant) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, and Chrysler Canada Ltd. and The Chrysler Corporation, (Respondents). (*Withdrawn*).

**2584-82-U:** Teamsters' Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Henderson Machinery Moving and Installation Limited, (Respondent). (*Withdrawn*).

**2661-82-U:** International Molders & Allied Workers Union, (Complainant) v. Washington Mills Limited, (Respondent). (*Withdrawn*).

**2766-82-U:** Health, Office & Professional Employees, Division of R.C.I.U., Local 206, Chartered by U.F.C.W.I.U., (Complainant) v. Erin Mills Lodge, (Respondent). (*Withdrawn*).

**2767-82-U:** Canadian Union of Public Employees, (Complainant) v. Streamway Villa Nursing Home, (Respondent). (*Withdrawn*).

**0004-83-U:** Ermin Jones, (Complainant) v. United Steelworkers of America District 6, (Respondent) v. H. B. Fuller Canada Inc., (Intervener). (*Dismissed*).

**0006-83-U:** Glass, Pottery, Plastics and Allied Workers International Union, (Complainant) v. Roos Manufacturing Ltd., (Respondent). (*Withdrawn*).

**0031-83-U; 0032-83-U:** Canadian Union of Public Employees, (Complainant) v. Streamway Villa Nursing Home, (Respondent). (*Withdrawn*).

**0033-83-U:** International Ladies Garment Workers' Union, (Complainant) v. Moda Corp., (Respondent). (*Withdrawn*).

**0043-83-U:** Joseph Sawyer, (Complainant) v. United Association, Plumbing and Pipe Fitting, (Respondent). (*Withdrawn*).

**0050-83-U:** United Electrical, Radio & Machine Workers' of America, (UE), (Complainant) v. GKL Industries Limited, (Respondent). (*Withdrawn*).

**0060-83-U:** Carmelita Carangay, (Complainant) v. United Steelworkers of America, (Respondent) v. The Canadian Coleman Company Limited, (Intervener). (*Withdrawn*).



- 0061-83-U:** Joseph B. Manuel, (Complainant) v. U.A.W., Local 222, (Respondent). (*Withdrawn*).
- 0088-83-U:** Harold Timms and Raymond Vienneau, (Complainant) v. International Woodworkers of America, (Respondent). (*Withdrawn*).
- 0095-83-U:** The Canadian Union of Public Employees, (Complainant) v. The Corporation of the Town of Iroquois Falls, (Respondent). (*Withdrawn*).
- 0097-83-U:** Labourers' International Union of North America, Local 183, (Complainant) v. The Meridian Building Group and/or 308182 Ontario Limited, (Respondent). (*Withdrawn*).
- 0100-83-U:** Hotel Employees and Restaurant Employees Union, Local 75, (Complainant) v. InnTowner Motor Hotel (Thunder Bay, Ontario), (Respondent). (*Withdrawn*).
- 0122-83-U:** Canadian Union of Public Employees, (Complainant) v. South Haven Nursing Home, (Respondent). (*Withdrawn*).
- 0135-83-U:** Fern Beaudin, (Complainant) v. R. Slater, William Sherman, J.G. Pesheau and Local Union 1669, (Respondent). (*Withdrawn*).
- 0138-83-U:** International Beverage Dispensers' and Bartenders' Union, Local 280, (Complainant) v. Edwin Hotel, (Respondent). (*Withdrawn*).
- 0139-83-U:** Mrs. Catherine Syme, (Complainant) v. Graphic Arts International Union, Local No. 28-B, (Respondent). (*Dismissed*).
- 0142-83-U; 0143-83-U:** Canadian Union of Public Employees, (Complainant) v. Streamway Villa Nursing Home, (Respondent). (*Withdrawn*).
- 0146-83-U:** Kim Rankin, (Complainant) v. The Union Local P-688 Canadian Allied Workers and The Company Management of Black Diamond Cheese, (Respondents). (*Withdrawn*).
- 0149-83-U:** International Ladies' Garment Workers' Union, (Complainant) v. Percy Lindzon Limited, (Respondent). (*Withdrawn*).
- 0172-83-U:** Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel and Restaurant Employees' and Bartenders' International Union, A.F. of L., C.I.O., C.L.C., (Complainant) v. 408967 Ontario Limited, Known as: Dovercourt Tavern, (Respondent). (*Withdrawn*).
- 0173-83-U:** Ontario Public Service Employees' Union, (Complainant) v. Superior Ambulance Limited, (Respondent). (*Withdrawn*).
- 0175-83-U:** Ms. Bev Cook, (Complainant) v. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 879, (Respondent). (*Withdrawn*).
- 0180-83-U:** Retail Clerks' Union, Local 409, (Applicant/Complainant) v. Northwest Merchants Ltd. Canada, (Respondent). (*Granted*).
- 0181-83-U:** Service Employees' International Union, Local 183, A.F.L., C.I.O., C.L.C., (Complainant) v. Rickarton Castle Inc., (Respondent). (*Withdrawn*).
- 0183-83-U:** Local Union 105, International Brotherhood of Electrical Workers, (Complainant) v. Tom Harris Incorporated and Camco Inc., (Respondent). (*Withdrawn*).

**0196-83-U:** Ontario Nurses' Association, (Complainant) v. Oakland Park Lodge, (Respondent). (*Withdrawn*).

**0207-83-U:** UAW Members, Paul M. Onderwater et al, (Complainants) v. UAW, Local 27, Unit 13, (Respondent). (*Withdrawn*).

**0209-83-U:** Harry W. Kellas, (Complainant) v. Amalgamated Transit Union, Local 113, (Respondent). (*Withdrawn*).

**0262-83-U:** Kenneth Arthur Colebrook, (Complainant) v. Edmond Duquette, (Respondent). (*Withdrawn*).

## APPLICATIONS FOR CONSENT TO PROSECUTE

**2646-82-U:** Retail Clerks' Union, Local 49, (Applicant/Complainant) v. Northwest Mechants Ltd. Canada, (Respondent). (*Dismissed*).

## APPLICATIONS FOR RELIGIOUS EXEMPTION

**2740-82-M:** C. Arnold Cherry, (Applicant) v. United Electrical, Radio & Machine Workers of America, (UE) and its Local 507, (Respondent Trade Union) v. Canadian General Electric Company Limited, (Respondent Employer). (*Granted*).

## APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

**2701-82-M:** A. G. Simpson Company Limited, (Applicant Employer) v. Simpson Plant Council, (Applicant Trade Union) v. International Union United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), (Intervener). (*Dismissed*).

**0062-83-M:** Feasby Services Ltd., St. Catherines, (Employer) v. Textile Procesors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Trade Union). (*Granted*).

**0285-83-M:** J. E. Thomas Specialties Ltd., (Employer) v. United Rubber, Cork, Linoleum and Plastic Workers of America, AFL, CIO, CLC, Local #921, (Trade Union). (*Granted*).

## JURISDICTIONAL DISPUTES

**1171-82-JD:** The United Association of Plumbers and Steamfitters and Apprentices of the United States and Canada, Local Union 508, (Complainant) v. Stone & Webster Canada Ltd. and International Association of Bridge, Structural and Ornamental Iron Workers, Local 786, (Respondents). (*Withdrawn*).

**0048-83-JD:** Edland Building Systems Ontario Limited, (Complainant) v. Sheet Metal Workers' International Association, Local 537 and International Association of Bridge, Structural & Ornamental Ironworkers, Local Union 736, (Respondents). (*Dismissed*).

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**0059-83-M:** St. Thomas Times-Journal, A Division of Canadian Newspapers Limited, (Applicant) v. The International Typographical Union, Local 459, (Respondent). (*Withdrawn*).

**0117-83-M:** Customs Excise Union, (Applicant) v. Office and Professional Employees' International Union - AFL-CIO-CLC, Local 225, (Respondent). (*Withdrawn*).

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**2734-82-OH:** International Association of Machinists and Aero Space Workers (I.A.M.) Local Lodge 905, (Applicant) v. Dowty Equipment of Canada Ltd., (Respondent). (*Dismissed*).

**0083-83-OH:** United Steelworkers of America, Local 4632 Richard F. Lemenchick, Safety Rep., Local 4632, (Complainant) v. Osborne Stewart, Foreman, Chromasco Limited, (Respondent). (*Withdrawn*).

**0187-83-OH** Mr. Rick Eves (Complainant) v. Mrs. Mary E. Grant, Administrator Teck Pioneer Residence, (Respondent). (*Withdrawn*).

## CONSTRUCTION INDUSTRY GRIEVANCES

**2288-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. Losereit Sales and Services Ltd., (Respondent). (*Denied*).

**2494-82-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Commercial Forming Ltd., (Respondent). (*Withdrawn*).

**2521-82-M:** The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, and Carpenters' Local 249, (Applicant) v. Dinamo Developments Limited, Dinamo Flooring & Contractors Ltd., (Respondents). (*Granted*).

**2576-82-M:** The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Ontario Hydro, (Respondent). (*Withdrawn*).

**2649-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Riverside Aluminum & Building Products Limited, (Respondent). (*Withdrawn*).

**2652-82-M:** Labourers' International Union of North America, Local 506, (Applicant) v. Canadian Cutting & Coring Limited, (Respondent). (*Withdrawn*).

**2675-82-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Tropical Insulation Company Limited carrying on business as Macon Drywall Systems, (Respondent). (*Withdrawn*).

**2676-82-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Torino Drywall Co. Limited, (Respondent). (*Withdrawn*).



**2723-82-M:** The International Brotherhood of Electrical Workers, Local Union 1788, (Applicant) v. Ontario Hydro, (Respondent). (*Dismissed*).

**2756-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Ramo Carpentry Company Ltd., (Respondent). (*Withdrawn*).

**2764-82-M:** The Built-up Roofers', Damp and Waterproofers' Section of the Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association, Local Union 504, (Applicant) v. Continental Roofing Limited, (Respondent). (*Granted*).

**0002-83-M:** International Association of Bridge, Structural and Ornamental Iron Workers, (Applicant) v. Ontario Hydro, (Respondent). (*Granted*).

**0027-83-M:** United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Valente Construction Ltd., (Respondent). (*Withdrawn*).

**0046-83-M:** The Built-Up Roofers', Damp and Waterproofers' Section of the Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association, Local Union 504, (Applicant) v. M. C. Lepper Ltd., (Respondent). (*Granted*).

**0047-83-M:** The Built-Up Roofers', Damp and Waterproofers' Section of the Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association, Local Union 504, (Applicants) v. Semple-Gooder Northern Limited, (Respondent). (*Granted*).

**0081-83-M:** Labourers' International Union of North America, Local 506, (Applicant) v. Metropolitan Toronto House Wreckers' Association, (Respondent). (*Granted*).

**0087-83-M:** Local 93, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Les Entrepreneurs Casey Hewson Ltee and Casey-Hewson Contractors Ltd., (Respondents). (*Withdrawn*).

**0112-83-M:** Local 93, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. J & X Interiors Ltd., (Respondent). (*Withdrawn*).

**0113-83-M:** United Brotherhood of Carpenters and Joiners of America Local 2041, (Applicant) v. Kor-Ban Inc., (Respondent). (*Withdrawn*).

**0114-83-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041, (Applicant) v. Nation Drywall Contractors Ltd., (Respondent). (*Granted*).

**0116-83-M:** International Union of Bricklayers and Allied Craftsmen, Ontario Provincial Conference and the International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicants) v. Stephen Sura Inc., Stephen Sura (Canada) Ltd., (Respondents). (*Withdrawn*).

**0124-83-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Cloverlawn Concrete & Drain Ltd., (Respondent). (*Withdrawn*).

**0127-83-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Beer Precast Concrete Limited, (Respondent). (*Withdrawn*).

**0131-83-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Unic Drywall Ltd., (Respondent). (*Withdrawn*).

**0136-83-M:** International Union of Operating Engineers, Local 793, (Applicant) v. West Front Construction Ltd., (Respondent). (*Withdrawn*).

**0155-83-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Foundation Company of Canada, (Respondent). (*Withdrawn*).

**0156-83-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Earth Boring Company Limited, (Respondent). (*Withdrawn*).

**0160-83-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Andrew Paving & Engineering Limited, (Respondent). (*Granted*).

**0167-83-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Cochrane Court Systems, (Respondent). (*Granted*).

**0169-83-M:** Ontario Sheet Metal Workers' Conference Sheet Metal Workers' International Association, Local Union No. 537, (Applicant) v. Stoney Creek Mechanical Limited, (Respondent). (*Granted*).

**0185-83-M:** The Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1494, (Applicant) v. Wall Systems of Canada (Ontario) Limited, (Respondent). (*Withdrawn*).

**0189-83-M:** Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Atlas Display Store Fixtures, (Respondent). (*Granted*).

**0190-83-M:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, (Applicant) v. M and M Steel Erectors, (Respondent). (*Withdrawn*).

**0199-83-M:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. Gilbert Steel Limited, (Respondent). (*Withdrawn*).

**0204-83-M:** Labourers' International Union of North America, Local 506, (Applicant) v. Holman Design Limited, (Respondent). (*Withdrawn*).

**0208-83-M:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, (Applicant) v. Apollo Steel Co. Ltd., (Respondent). (*Granted*).

**0211-83-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Stephen Sura (Canada) Ltd., (Respondent). (*Withdrawn*).

**0228-83-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Gawnar Construction Ltd., (Respondent). (*Withdrawn*).

**0229-83-M; 0230-83-M:** United Brotherhood of Carpenters and Joiners of America, Local 27, (Applicant) v. Suss Woodcraft Ltd., (Respondent). (*Withdrawn*).

**0259-83-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Pro Interior Systems, (Respondent). (*Withdrawn*).

**0260-83-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Century Drywall & Acoustics Ltd., (Respondent). (*Withdrawn*).

**0261-83-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. T. Richardson Mechanical & Millwrighting Inc., (Respondent). (*Granted*).

**0266-83-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Ventrella Bros. Construction Ltd., (Respondent). (*Withdrawn*).

**0268-83-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Myron Construction (carrying on business as Canadian Conduit & Cable Const. Ltd.), (Respondent). (*Withdrawn*).

**0281-83-M:** United Brotherhood of Carpenters and Joiners of America, and Local 249 Kingston Ont., (Applicant) v. Shandon Associates Ltd., (Respondent). (*Withdrawn*).

**0282-83-M:** Laborers' International Union of North America, Local 607, (Applicant) v. LeBrun Constructors Ltd., (Respondent). (*Granted*).

**0284-83-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Kalabria General Contracting Ltd., (Respondent). (*Withdrawn*).

**0299-83-M:** International Brotherhood of Electrical Workers, Local Union 402, (Applicant) v. R.J. Ball Electric Limited, (Respondent). (*Granted*).

**0354-83-M:** The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Applicant) v. Lummus Canada Inc., (Respondent). (*Terminated*).

**0359-83-M:** Local 200 of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Meteor Painters Contractors (Canada) Ltd., (Respondent). (*Withdrawn*).

**0370-83-M:** The Form Work Council of Ontario (Affiliate International Union of Operating Engineers, Local 793, (Applicant) v. The Ontario Form Work Association and its Affiliate Climb Formwork Ltd., (Respondent). (*Withdrawn*).

**0371-83-M:** The Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1494, (Applicant) v. Trojan Interior Contracting Limited, (Respondent). (*Withdrawn*).

## APPLICATION FOR RECONSIDERATION OF BOARD'S DECISION

**1517-82-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Ideal Plumbing Supplies Inc., (Respondent) v. Group of Employees, (Objectors). (*Denied*).











*Ontario Labour Relations Board,  
400 University Avenue,  
Toronto, Ontario*

ISSN 0383-4778





Ontario  
Labour Relations  
Board

# Decisions

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# ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1983] OLRB REP. JULY**

Selected decisions of particular reference value are  
also reported in *Canadian Labour Relations Boards  
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**0569-83-M** Labourers' International Union of North America, Local 506, Applicant, v. **Canadian Engineering and Contracting Co. Ltd.**, Respondent

**Construction Industry Grievance - Whether grievor discharged or laid-off for lack of work - Whether just cause for discharge based on poor quality of work - Warning required before ultimate penalty of discharge - Grievor reinstated with compensation**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members J. A. Ronson and J. Kennedy.

**APPEARANCES:** *Chris G. Paliare, Tony Neil and Carmen Principato for the applicant; D. L. Brisbin and K. B. Paulin for the respondent.*

**DECISION OF THE BOARD;** July 13, 1983

1. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*.

2. The grievance alleges that the respondent Canadian Engineering and Contracting Co. Ltd. (hereinafter referred to as the "company") violated the collective agreement between the parties, by discharging Pat Colella (the "grievor"). It is alleged that the discharge was "without just cause" and, consequently, that it was contrary to Article 5.01(a) of the collective agreement. That Article both defines and limits management rights. It reads as follows:

5.01 The Union agrees and acknowledges that the Employer has exclusive rights to manage the business and to exercise such right without restriction save and except such prerogatives of management as may be modified by the terms and conditions of this Agreement. Without restricting the generality of the foregoing paragraph it is the exclusive function of the Employer:

(a) to determine qualifications, classify, transfer, hire, direct, promote, demote, lay-off, discipline, and *discharge for just cause* Employees and to increase or decrease or transfer forces in accordance with the terms of this Agreement.

[emphasis added]

3. The company is a construction subcontractor which was engaged in the spring of 1983 by Lummus, the general contractor, to perform certain work at the B.P. Refinery in Bronte, Ontario. The work was scheduled for completion on May 15, 1983. The grievor was employed on May 2, 1983, after being referred from the union hiring hall. His employment was terminated on May 12, 1983.

4. Eric Sundin, the company's job superintendent, testified that the grievor's employment was terminated because he (Sundin) was dissatisfied with the quality of the grievor's work. Sundin told the Board that on Wednesday, May 11th, he had requested six more employees from the union's Toronto hiring hall so that, *inter alia*, he could replace the grievor with a better worker. According to Sundin, his concerns about the grievor's

work habits were shared by two other foremen (who did not testify) and by Gerry Fontaine, a general superintendent working for Lummus (who also did not testify). Sundin said that on Thursday, May 12th, Fontaine told him that he should get rid of the grievor who, it was said, was a bad example to the other employees. The grievor was terminated that afternoon. According to Sundin, however, the decision to remove the grievor was made the previous day.

5. It is admitted that no one ever warned the grievor about the quality of his work, or told him that his job was in jeopardy if it did not improve. Indeed, Sundin said that his duties did not normally include the direct supervision of the grievor, so that the direct evidence concerning the quality of the grievor's work is sketchy at best. What is clear, is that the grievor's employment was terminated within hours of the complaint from the representative of the general contractor. In addition, Carmen Principato testified that Sundin told him that Fontaine's complaint was the principle reason for removing the grievor from the job site. "Don't blame me", Sundin told Principato when the latter enquired about the grievor's discharge, "Lummus asked me to lay him off". Principato told the Board that he regarded Sundin's request for more men as a response to Principato's complaint that there were Hamilton-based workers on the site. Principato did not regard it as a way of replacing the grievor.

6. On Monday, May 9th, Sundin learned that the company's work contract, which was originally expected to be completed on May 15th, would in fact be extended for an additional couple of weeks. Overtime work was scheduled for every day during that week, including Saturday. The grievor worked overtime in the days immediately preceding his termination. Whatever qualms there may have been about the grievor's work, they did not prevent the company using him for extended hours until his discharge on Thursday, May 12th.

7. On Tuesday, May 10th, the grievor was summoned to Sundin's office to re-sign certain employment papers which had not been properly completed when the grievor was first hired. That Tuesday, Sundin told the grievor that the job was expected to continue for a couple of more weeks. At no time did Sundin indicate that the grievor's position was in any way in jeopardy or that there was any concern about the quality of his work. In the circumstances, the grievor concluded, not unreasonably, that he could expect to work for the company on the B.P. site for at least another week or two. He was quite surprised when he was unexpectedly "laid off" two days later. Sundin told the grievor at the time that he was being "laid off" for lack of work.

8. The company argues that the grievor was not "discharged" at all, but rather was "laid off" for lack of work – as it indicated to the grievor himself at the time of his termination. The company asserts that since the grievor was not "discharged", Article 5.01 can have no application. Alternatively, it is argued that there was "just cause" for the grievor's discharge based upon the company's dissatisfaction with the quality of his work.

9. We cannot accept the company's contention that the grievor was "laid off" for lack of work. No doubt, work began to decline shortly after the grievor's "layoff", but with the exception of an employee who quit and was not replaced, the total work force remained stable for at least the first few days following the grievor's termination. The evidence simply does not demonstrate that the grievor had to be laid off for lack of work



on May 12th, nor did Sundin's testimony (despite what he told the grievor) really support that conclusion. Sundin's concern was with what he considered to be an inadequate level of effort on the grievor's part, but it is difficult to resist the conclusion that even that concern did not gain prominence until the day of the grievor's termination, when a representative of the general contractor expressed dissatisfaction. On the basis of the totality of the evidence before us, we are satisfied that the grievor's termination on May 12, 1983, is properly characterized as a "discharge"; and further that it is extremely doubtful whether he would have been terminated at all on that day had it not been for Fontaine's comments. There remains the question of whether that discharge was without just cause.

10. Most arbitrators now hold that implicit in the requirement to have "just cause" for *discharge* (especially given section 44(9) of the *Labour Relations Act*) is the obligation to consider some form of "progressive" or "corrective" approach to employee discipline before terminating the employment relationship. Very simply, this means that it would be unjust to leap to a discharge rather than employing some lesser sanction (a warning or suspension) to give the employee an inducement to mend his ways and conform to an acceptable standard of behaviour. An employee who is warned that his conduct is unacceptable is clearly put on notice that if it continues he will risk increasing sanctions culminating eventually in his termination. To put the matter colloquially, he knows that his "job is on the line" and if he does not "shape up" he will have to "ship out". The arbitral jurisprudence with respect to the necessity of warning an employee of management's dissatisfaction with the quality of his performance is summarized as follows in: Brown & Beatty, *Canadian Labour Arbitration* (Agincourt); Canada Law Book Ltd., (1977) at paragraph 7:3452:

Although it has been suggested that the employer is not required to warn an employee of its dissatisfaction with his work performance in those instances in which he is terminated or otherwise dealt with in a non-disciplinary manner, the majority of arbitrators who have considered the issue have expressly or implicitly rejected this point of view. Indeed, when read together with some of the more recent awards dealing with incapacitated employees generally, it would appear that in all instances of substandard work performance, whether voluntary or involuntary, the employer should first apprise its employees of any deficiencies it perceives in their work habits. That is, while recognizing that formally admonishing or warning an employee that unless his performance improves further and more severe action will result, may in certain circumstances be neither appropriate nor required, nevertheless arbitrators have recognized that only if the employer communicates and advises of its concern will an employee have the knowledge necessary to induce him to seek whatever assistance is available to enable him to improve his performance.

11. We accept, of course, that the employer-employee relationship in the construction industry is not a close one, and is not comparable with relationships that arise between employers and their employees in an industrial setting. Employment relationships are transitory and, as in the present case, workers will be referred from the

hiring hall and employed for short periods of time without the kind of pre-selection which would be undertaken by an industrial employer before engaging workers who could conceivably be employed on a long-term basis. Accordingly, we accept the need for a certain amount of realism and arbitral restraint in determining what constitutes just cause for discharge in a construction context. However, we are not persuaded that either the arbitral jurisprudence or the language of the collective agreement before us requires us to apply considerations that are *totally different* from those applied by arbitrators to employers who use the same language in collective agreements in other industries. In particular, the Board is of the view that the employer must at least warn a grievor that his job is in jeopardy prior to discharging him for "unsatisfactory performance" – which is what we found has happened in the circumstances of this case. In *Re Hardold R. Stark Limited et al.* (1972), 1 L.A.C. (2d) 406 (Egan), the majority of the Board observed (at pages 406-407):

It was argued by the company that because of the special nature of the construction industry, different considerations ought to apply with respect to the discharge of employees to those obtaining in industry in general. In this regard, it is of some significance to note that the grievors are not in the position of long-term employees whose previously acceptable work performance has deteriorated. The grievors were assigned to the company by the union under the terms of the collective agreement. That is, of course, an arrangement quite common in the construction industry. In consequence of this practice, the grievors were taken on without any pre-hiring or qualifying interview such as might enable the company to make a pre-employment assessment. They entered into the employment of the company purporting to be competent tradesmen and were not subject to any probationary period of evaluation by the company. Therefore, there is no question of any knowledge, on the part of the company, as to the proficiency of the grievors at the time of their engagement as tradesmen qualified in the classifications which they hold.

We are not wholly persuaded, however, that totally different considerations from those applied to industry in general are applicable to discharge cases in the construction industry. In this connection, our attention was drawn to *Re United Ass'n of Journeymen & Apprentices of the Plumbing and Pipefitting Industry, Local 221, and Fraser-Brace Engineering Co. Ltd.* (1968), 19 L.A.C. 258 (Christie). This case involved the question of the discharge of an employee for "loafing" on a construction site. The company, in that case, argued that different considerations applied to discharge in the construction industry. The board, in its decision in that case, stated that it was not unimpressed by the argument that rather different considerations may apply in the determination of what constitutes just cause for dismissal in the construction industry.

The grievor in the *Fraser-Brace* case, *supra*, appears to have been a chronic time waster, but received no admonitions from the company

with respect to his conduct prior to his discharge. The board went on to say, however, that "It is unnecessary to decide what differences it makes that we are dealing with the construction industry. Even if the requirements of 'cause' and just cause were considerably lower than they are in general industrial situations 'cause' for dismissal was not established here." The board went on to find that the discharge was unjust because of the absence of a warning and reinstated the grievor.

See also *Proweld Company Limited*, [1982] OLRB Rep. March 437, and *White and Greer Company Limited*, Board File No. 1404-81-M, decision dated November 23, 1981, unreported, in which this Board confirmed that prior to the discharge of an employee in the construction industry for lack of production or inadequate quality, the employee is entitled at least to a warning that the employer is dissatisfied.

12. We accept these propositions. Notwithstanding the rather special environment of the construction industry which would arguably warrant a lesser standard of "just cause" for discharge, it is our view that before an employee can be justly discharged for inadequate work performance he must at least be warned that his performance is inadequate and that if it does not improve his continued employment would be jeopardized. In the absence of such warning so that an employee clearly understands the standard of performance expected of him, it is our opinion that a discharge would be unjust.

13. We find, therefore, that the grievor's discharge on May 12, 1983 was without just cause. It may be that his work performance was not entirely satisfactory and that he would have been terminated within a few days in any event, and we do not question the right of an employer faced with a *bona fide* shortage of work to lay off those employees who are the least productive. But we need not speculate. For the purposes of this case, it suffices to determine, as we do, that the grievor's discharge on May 12, 1983 was without just cause. Accordingly, the Board directs that he be reinstated in employment as at May 12, 1983, and compensated for any wages or benefits lost between May 12, 1983 and the time when he would have been laid off in the ordinary course of business. In accordance with the agreement of the parties, the Board will remain seized of this matter in the event that the parties are unable to agree on the amount of compensation to which the grievor is entitled.

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**2717-82-R** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Applicant, v. **Consolidated Maintenance Services Limited**, Respondent

Adjournment - Membership Evidence - Practice and Procedure - Membership evidence filed not disclosing dollar payment - Applicant seeking adjournment to enable retaining counsel and calling viva voce evidence of payment - Viva voce evidence of membership precluded - Adjournment denied and application dismissed

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members J. A. Ronson and H. Kobryn.

***APPEARANCES:** Stan Petronski and Matt Bakker for the applicant; Richard Nixon, Bill Robertson, Tom Brown, John Grey and Donald F. O. Hersey for the respondent.*

**DECISION OF THE BOARD;** July 4, 1983

1. This is an application for certification made pursuant to the construction industry provisions of the *Labour Relations Act*. At the hearing into the application on June 20th, 1983, the Board refused the applicant's request for an adjournment and dismissed the application. This decision sets out the Board's reasons for so doing.

2. The application was originally scheduled for hearing on May 20th, 1983 and was adjourned at the request of the parties. Notice of that hearing in the Board's customary form for applications for certification in the construction industry was sent to the applicant and respondent on April 5th, 1983. That notice contained the following statement with respect to the purpose of the hearing.

The purpose of this hearing is to hear the evidence and the representations of the parties with respect to all matters arising out of and incidental to the application, including:

- (a) the acceptability of the applicant's membership evidence. The applicant filed "confirmation documents" signed by members of the applicant which state: "I have been and still am paying dues to said organization", but do not state the amount of the dues or the most recent time period for which they were paid.
- (b) the failure of the applicant to file a completed Form 80, Declaration Concerning Membership Documents, Construction Industry.
- (c) the claim by the respondent that it is performing maintenance rather than construction work, and,
- (d) the claim by the respondent that it is party to a "General Presidents" agreement.

The notices sent to the parties with respect to the June 20th hearing contained the same statement of purpose as the original notice.



3. The applicant was not represented by counsel at the hearing. At the commence of the hearing, the applicant asked the Board's consent to an adjournment so that it could engage counsel. The applicant told the Board that it had been expecting to engage in discussions with the respondent in order to settle the issues between them and as late as the Friday prior to the hearing had anticipated such a meeting. Consequently it was not prepared for the hearing and had not sought to engage legal counsel on the expectation that the hearing would not be proceeding. Counsel for the respondent was opposed to an adjournment of the hearing. In answer to a query from the Board as to the nature of the evidence which the applicant would be seeking to call with respect to item (a) of paragraph 3 of the Board's notice, the applicant advised the Board that it wished to call oral evidence with respect to the amounts of dues paid and the time period for which they had been paid by those employees whom the applicant was seeking to represent and claiming as its members. With respect to item (b), the applicant advised the Board that it had not filed with the Board a completed Form 80, "Declaration Concerning Membership Documents, Construction Industry" since the adjournment of the hearing which had been scheduled for May 20th. Nor did the applicant seek to file the declaration at the hearing on June 20th. Counsel for the respondent was opposed to the applicant being permitted to call evidence with respect to the amounts of union dues or initiation fees on the grounds that it was specifically prohibited by section 73(2) of the Board's Rules of Procedure and by the Board's jurisprudence with respect to the application of that section.

4. The Board requires membership evidence from an applicant for certification in order to satisfy the Board's mandate under section 7(1) of the Act to determine the number of employees in the bargaining unit who were members of the applicant at the time the application was made. The terms "member" and "membership" with respect to a trade union are defined in section 1(1)(l) of the Act as follows:

1.-(1) In this Act

(1) "member", when used with reference to a trade union, includes a person who,

(i) has applied for membership in the trade union, and

(ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and "membership" has a corresponding meaning.

Section 103(2)(j) of the Act empowers the Board exclusively "to determine the form in which ... evidence of membership in a trade union ... shall be presented to the Board on an application for certification ..., and to refuse to accept any evidence of membership ... that is not presented in the form ... so determined;".

5. The Board is further empowered by section 102(13) of the Act to determine its own practices and procedures, to make rules governing its practice and procedure and to prescribe such forms as it considers advisable. In accordance with those powers, the Board has provided in section 73 of its Rules of Procedure certain requirements which

must be met before evidence of membership in a trade union will be accepted by the Board. In that respect, section 73(1) of the Rules of Procedure provides as follows:

“Evidence of membership in a trade union ... shall not be accepted by the Board on an application for certification ... unless the evidence is in writing, signed by the employee or each member of a group of employees, ..., and, ... is not filed later than the terminal date for the application.”;

and section 73(2) provides that:

“No oral evidence of membership in a trade union ... shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).”.

See the Board’s decision in *P.R.C. Chemical Corporation of Canada Ltd.*, [1980] OLRB Rep. May 749 for a thorough review of the historical development and the application of the statutory provisions referred to above and of section 73 of the Board’s Rules of Procedure.

6. Applicants for certification are advised of the requirements of section 73 of the Rules of Procedures by means of the Board’s notice setting the terminal date for the application and advising the parties of the hearing into the application. This notice is sent to an applicant immediately upon receipt of its application. In the instant application, being an application for certification in the construction industry, the relevant form is Form 76, “Notice of Fixing Terminal Date, Construction Industry and Hearing Before the Ontario Labour Relations Board” and that form quotes verbatim subsections 1 and 2 of section 73 of the Rules of Procedure. This notice was sent to the applicant herein on April 5th, 1983.

7. Pursuant to section 73(2) of the Rules of Procedure, the Board has consistently refused to allow an applicant to adduce evidence with respect to the fact of membership in the applicant trade union; in other words, evidence going to whether the employee has applied in writing and whether the employee has paid not less than one dollar with respect to membership dues or initiation fees. The Board has done so for reasons of certainty so that applicant’s will know what standards must be met with respect to membership evidence; and to avoid litigation, thus protecting the identity of the trade union supporters pursuant to section 111(1) of the Act and expediting the processing of the application for certification. See *P.R.C. Chemical Corporation*, *supra*, and the cases referred to therein.

8. The form of membership evidence filed by the applicant herein failed to reveal whether the persons whom it was seeking to represent had paid at least one dollar with respect to union dues or initiation fees. That is a question of material fact as to whether the persons were members of the applicant within the meaning of s.1(1)(l) of the Act. The exception provided by s.73(2) of the Rules of Procedure with respect to oral evidence is that it may be accepted to identify and substantiate the written evidence. The evidence which the applicant is seeking to call is evidence going directly to the fact of membership and is not merely to identify and substantiate the written evidence. For the reasons given in the Board’s decision in *P.R.C. Chemical Corporation*, *supra*, the Board has consistently

declined to hear such oral evidence. There is nothing in the representations before the Board herein to cause it to depart from such application of the exception with respect to oral evidence in section 73(2) of the Rules. That being the case, no purpose would be served by consenting to the applicant's request for adjournment. Accordingly the Board withheld its consent to adjournment of the hearing.

9. Having regard for the membership evidence before the Board and the absence therefrom of any evidence that the employees whom the applicant is claiming as members have paid at least one dollar in respect of initiation fees or monthly dues of the applicant, the Board finds that the employees were not members of the applicant within the meaning of the Act on the date of this application. Therefore the Board is not satisfied that any of the employees of the respondent in the bargaining unit sought by the applicant were its members on the date of this application.

10. In the result, the application is dismissed.

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**0296-83-U Terry Davey, Complainant, v. Canadian Union of Public Employees, Local 16, Respondent**

**Practice and Procedure - Remedies - Unfair Labour Practice - Unfair labour practice complaint against union settled - Union not complying with terms of settlement - Board finding violation of section 89(7) - No compensation damages - Board making declaration and directing mailing of notice**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and C. A. Ballentine.

**APPEARANCES:** *Terry Davey, Irene Bovay, Della Rahn, Henry Bates, Jr., Shirley McCrea and Glenna Davey for the complainant; Helen O'Regan, R. J. Anderson, Paul Jordison, Ogilvy Russell and Tim Edwards for the respondent.*

**DECISION OF THE BOARD;** July 12, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* in which it is alleged that the respondent has not complied with the terms of settlement of certain earlier section 89 complaints, contrary to section 89(7) of the Act.

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3. On January 5, 1983, the parties entered into a written settlement in respect of Board File Nos. 1627-82-U, 1629-82-U, and 1841-82-U. The parts of that settlement material to the present complaint provide as follows:

Between Terry Davey - Complainant

And - C. U. P. E. Local 16 - Respondent

### Agreement of the Parties

In the above matters the parties have met together and following lengthy discussion agree to resolve their differences in the following manner:

1. In the matter of the "Irene Bovay" Complaint (Board File #1629-82-U) the Respondent denies the allegation of failure to process a Complaint/Grievance on behalf of the Grievor and hereby reiterates its position that it will promptly process a grievance on behalf of Irene Bovay claiming the difference in pay between a Caretaker and a Cleaner classification for the relevant two week period in July 1982, on the understanding that in the event consideration of arbitrating the grievance arises the decision to arbitrate or not to arbitrate shall be submitted to the regular membership meeting and shall be decided by the membership vote. Both parties and the grievor hereby agree to accept in good faith the decision of the membership on this question.

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3. The Respondent hereby confirms and reiterates its intention to support the Employment Standards Officer's position before the Referee at the forthcoming hearing.

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4. At the hearing in this matter on June 15, 1983 in Sault Ste. Marie, the Board heard the testimony of seven witnesses and also received certain documentary evidence. Having regard to all of that evidence, the Board finds the relevant facts to be as follows.

5. There has been turmoil within the respondent Local for some time due, at least in part, to the fact that certain female employees of the Sault Ste. Marie Board of Education (the "employer") classified as cleaners are of the view that they have been the victims of sexual discrimination. In particular, they feel very strongly that there is no justification for paying them a lower hourly rate than that paid to "caretakers". As a result of their complaints to the Ministry of Labour, Employment Standards Officer Sandra Bernhardt conducted an investigation which culminated in the following report to the Director of Employment Standards:

"I hereby report to you that the Sault Ste Marie Board of Education may have paid female employees classified as cleaners class 2, at a lesser rate of pay than male employees classified as caretakers class 4, who were performing substantially the same work, contrary to section 33(1) of the Employment Standards Act. This contravention of the Act has continued since or about May 11, 1980, and is continuing."

The Director subsequently appointed Referee Rory F. Egan to hold a hearing, under section 51 of the *Employment Standards Act*, concerning that matter.



6. The Ministry was represented before the Referee by Ministry lawyer Donald Wilson, and by Ms. Bernhardt. The employer was also represented by counsel. The hearings before the Referee commenced on February 28, 1983 and continued on May 2, 3, 4, and 5, 1983. R. J. Anderson, the Ontario Regional Director of C.U.P.E.; Helen O'Regan, a C.U.P.E. National Representative; and Tim Edwards, the President of Local 16, were all in attendance on behalf of the respondent on the first day of the Employment Standards hearing, but did not participate in the proceedings. Mr. Edwards was the respondent's sole representative at the continuation of those proceedings on May 2, 3, 4, and 5, 1983. When, during the course of those proceedings, the Referee asked Mr. Edwards what he was doing there, Mr. Edwards replied that he was the President of Local 16 and was there "as an observer". During his testimony before the Board, Mr. Edwards confirmed that he "didn't want to take sides" between the two factions within the Local concerning the Employment Standards issue.

7. It is abundantly clear from the evidence that the respondent has failed to comply with paragraph three of the settlement, which some local officials of the respondent appear to have interpreted as merely requiring them to support the cleaners "philosophically" and to abide by the Referee's ultimate decision. While there may be some room for legitimate differences of opinion concerning precisely what an obligation to "support the Employment Standards Officer's position before the Referee" may entail, there can be no doubt that it required something more than mere attendance of an official of the respondent "as an observer". That the Referee did not perceive the respondent to be supportive of the Employment Standards Officer's position is evident from the following passage which appears on page 3 of his decision dated June 16, 1983, which is now a matter of public record:

"The union did not actively participate in these proceedings. Its position was that of the Board [of Education] namely that the differential was not based upon sex and does not constitute a violation of section 33 of the [Employment Standards] Act."

8. The only remedy requested by the complainant in respect of the respondent's failure to comply with paragraph three of the settlement, and the only remedy which appears to the Board to be appropriate in relation to that breach in the circumstances of this case, is a declaration. The Referee, who is highly experienced in such matters, after carefully considering the extensive evidence which was adduced before him by counsel, found that the employer had not contravened the *Employment Standards Act*. Although the respondent has contravened the *Labour Relations Act* by failing to support the Employment Standards Officer's position before the Referee as it had agreed to do in the January 5, 1983 settlement, we are satisfied that this contravention has not resulted in any compensable harm to the grievors represented by the complainant, since it appears to us on the balance of probabilities that the Referee's decision would have been the same irrespective of the position taken by the respondent before the Referee.

9. As indicated above, the complainant also alleges that the respondent has not complied with paragraph one of the settlement (as quoted above). On or about January 18, 1983, the respondent, pursuant to that paragraph, filed a grievance on behalf of Ms. Bovay. The grievance alleged that the employer had violated its collective agreement with the respondent by failing to properly pay her for assuming the duties of a caretaker from July 5, 1982 to July 15, 1982, and requested that she be reimbursed the difference in pay

between her classification (a "cleaner class 2") and the classification of "caretaker class 5" for the period in question. The evidence concerning the steps taken by officials of the respondent in processing that grievance is quite sketchy. However, it appears that whatever may have occurred in the four-month period prior to May 25, 1983, on that date the respondent's grievance committee, chaired by Chester Edwards, indicated to management that Ms. Bovay's grievance was "resolved" because, in Mr. Edwards' view, "it did not have enough grounds based on contract agreement to succeed".

10. At the regular meeting of the respondent on June 4, 1983, Chester Edwards sought to place before the membership a recommendation of the grievance committee that Ms. Bovay's grievance not be further proceeded with. However, Paul Jordison, the C.U.P.E. National Representative assigned to the respondent at that time (and at the time of the hearing of this matter), in an effort to avoid further disagreement within the Local and to avoid a final disposition of the grievance, recommended that a decision by the membership on whether or not to refer the grievance to arbitration be postponed until after the Referee had issued his decision in the aforementioned proceedings under the *Employment Standards Act*. Although the issue involved in those proceedings was not the same as the issue raised by the grievance, we accept Mr. Jordison's evidence that he was of the opinion that the Employment Standards case might provide some "evidence" that would be pertinent to a decision concerning the advisability of referring Ms. Bovay's grievance to arbitration. That Mr. Jordison's view was not totally unreasonable is evident from the fact that Ms. Bovay was at least partially in agreement with that view, although her attitude toward the question of awaiting the Referee's decision was somewhat equivocal in that she was desirous of having the decision as a potential basis of support for her grievance, but was also desirous of ensuring that, if the Referee found no discrimination, his decision would not be used as a basis for refusing to refer her grievance to arbitration.

11. A substantial majority of the membership accepted Mr. Jordison's suggestion at the June 4th meeting, and directed the grievance committee to advise the employer that Ms. Bovay's grievance was still outstanding, and that the reason for not applying for arbitration at that point was that the Employment Standards decision had not yet issued. Unfortunately, in his letter to the employer concerning that matter, Chester Edwards, as the chairman of the respondent's grievance committee, not only advised the employer that the committee had been "overruled by the membership" which, in his view, had directed the committee "to further pursue the case through the grievance steps" with the employer, but also stated:

"Our committee which has now been directed by the membership in this matter is now requesting the Board [of Education] to hear the grievance at stage #5 or indicate to us it's [sic] rejection. Membership meetings are not held during July or August and therefore, if the Board rejects hearing the grievance further, the Union executive and the Union representative would have to decide whether or not to apply for Arbitration in the dispute."

A copy of that letter was sent to Ms. Bovay who, quite understandably, became very concerned that the respondent was not going to honour its agreement that "the decision to arbitrate or not to arbitrate" her grievance would be "decided by the membership".

12. After Mr. Jordison received a copy of that letter, he wrote to Chester Edwards as follows on June 13, 1983:

"On June 8, 1983, I received a copy of your letter to Mr. Ken Cliffe [the employer's Manager of Employee Labour Relations] re the above. I notice in your letter you advised Mr. Cliffe that membership meetings are not held in July or August and therefore the union executive and representative will have to make a decision on whether or not to apply for arbitration in this case.

As I stated to you and the membership on Saturday, June 4th, the agreement between Terry Davey, Complainant and CUPE Local 16, Respondent, Board file numbers 1627-82-U, 1629-82-U and 1841-82-U requires that this decision be made by the membership. As you know, this can be done in one of two ways:

1. at a general membership meeting or
2. at a special membership meeting called for this purpose.

Although we have already discussed the terms of the Davey-CUPE agreement and I am sure you have had an opportunity to review it, I am enclosing a copy of the OLRB agreement in full..."

Since Ms. Bovay was not provided with a copy of that letter, it did nothing to alleviate her legitimate concern that the respondent did not intend to comply with paragraph one of the settlement.

13. Having regard to all the evidence and the submissions of the parties, we find that the respondent has failed to comply with paragraph one of the settlement in that it has failed to "promptly" process Ms. Bovay's grievance. It has also given her reasonable cause to fear that "the decision to arbitrate or not to arbitrate" her grievance will be made not by the membership, as agreed, but rather by the "Union executive and the Union representative".

14. For the foregoing reasons, the Board hereby declares that the respondent has failed to comply with paragraphs one and three of the January 5, 1983 settlement, contrary to section 89(7) of the *Labour Relations Act*, and hereby directs the respondent to forthwith call a special membership meeting for the purpose of deciding whether or not to arbitrate the grievance of Irene Bovay, dated January 18, 1983. A copy of this decision and the attached notice marked "Appendix", duly signed by a representative of the respondent, is to accompany each of the notices to the membership concerning that special meeting.

## Appendix

### The Labour Relations Act

### NOTICE TO EMPLOYEES

We, Canadian Union of Public Employees, Local 16, have issued this notice in compliance with an order of the Ontario Labour Relations Board issued after a hearing in

which we, and certain members represented by Terry Davey, participated. The Ontario Labour Relations Board found that we violated the *Labour Relations Act* by failing to comply with paragraphs one and three of a written settlement which we entered into on January 5, 1983.

We assure all employees represented by us that:

WE WILL comply with the terms of the January 5, 1983 written settlement.

WE WILL NOT act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employees for whom we hold bargaining rights.

WE WILL forthwith call a special membership meeting for the purpose of deciding whether or not to arbitrate the grievance of Irene Bovay, dated January 18, 1983, as ordered by the Ontario Labour Relations Board.

Canadian Union of Public Employees, Local 16

per: \_\_\_\_\_  
(Authorized Representative)

July 12, 1983

THIS IS AN OFFICIAL NOTICE  
OF THE ONTARIO LABOUR RELATIONS BOARD

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**2382-82-U** Marin Bros., G. Uzelac, A. Levin, C. Panuci, G. Andreacchi, J. Vujasinovic, Marin Bros. A. Capistrano, John's Haulage, M. Prokic, G. Kell, B. Ligdas, B. Uzelac, G. Gialelis, V. Galati and N. McKenzie, Complainants, v. **Dufferin Aggregates**, A Division of St. Lawrence Cement Inc., and Torres Transport Limited and Nick Torres, Respondent, Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 304, Intervener

Arbitration - Interference in Trade Unions - Practice and Procedure - Unfair Labour Practice - Employees alleging employer conduct designed to undermine union - Union not joining in complaint - No unfair representation complaint filed against union - Individuals having no status to file under s.64 - Permitted to file under s.66 - Board inquiring into complaint alleging breach of s.66 but not s.64 - Circumstances not appropriate for deferral to arbitration

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members J. A. Ronson and S. Cooke.

**APPEARANCES:** *L. E. Fingold for the applicant; George O. Tokar and Nick Torres for Torres Transport Limited and Nick Torres; Mark Contini and Mike O'Connor for Dufferin Aggregates, A Division of St. Lawrence Cement Inc.; John McNamee and Cameron Nelson for the intervener.*

**DECISION OF PAMELA C. PICHER, VICE-CHAIRMAN AND BOARD MEMBER, S. COOKE; July 25, 1983**

1. The complainants in this matter are the 16 employees employed in the bargaining unit represented by the intervening union. The employees have filed a complaint under section 89 of the *Labour Relations Act* alleging that the respondent employer, Dufferin Aggregates, has violated sections 3, 64, 66, 70 and 80 of the Act. The union representing the 16 employees in the bargaining unit has declined to join with the employees in the filing of the instant complaint. While the employee complainants have expressed some disappointment with the union, they have declined to file a concurrent complaint against their union alleging that the union has breached its duty of fair representation.

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3. At the outset of the hearing counsel for Dufferin Aggregates objected to the status of the employees to bring the instant complaint. Counsel maintains that the complaint should be brought by the union instead of the employees because the essence of the employees' complaint is that Dufferin Aggregates is trying to destroy the union through the manner in which it is assigning work. Counsel argues that in the absence of a parallel allegation by the employees that the union has breached its duty of fair representation, the Board should decline to process a complaint of this nature brought by employees alone. Secondly, respondent counsel maintains that the Board should defer to arbitration as in his view the heart of the complaint involves an alleged breach of the collective agreement between Dufferin Aggregates and the intervener union.

4. Counsel for Dufferin Aggregates concedes that nothing in the Act either precludes employees from filing a complaint under section 89 of the Act or specifically requires the co-sponsorship of their union. Counsel emphasizes, however, that under section 89 of the Act the Board has the discretion to refuse to inquire into a complaint and asks that the Board do so in this instance for the reasons set out above.

5. The employees have complained, in part, that Dufferin Aggregates is engaged "in a concerted and systematic attempt to undermine and destroy the Union by depriving the members of the bargaining unit of the work to which they are historically and lawfully entitled, by referring this work to Torres Transport Limited", the second named respondent. The employees further assert that Dufferin Aggregates "is in deliberate and calculated violation of the Collective Agreement" through its disputed work assignments. They fear that the work assignments will ultimately have the effect of depriving them of any work whatsoever. The employees argue that the respondent's conduct constitutes a violation of sections 3, 64 and 66(a) of the Act which provide as follows:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

(64) No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.

6. The employees maintain that the employer's conduct is calculated to eventually deprive them of their employment. They strongly assert that they should be permitted access to the Board for the adjudication of their complaint in order to protect their very employment and to enforce their rights under the Act, notwithstanding that the union has declined to lend them its support.

7. On numerous occasions the Board has considered the status of an employee to bring a matter before the Board without the concurrent support of his union. There are some circumstances where the Board has declined to process an employee's individual complaint. In *T.I.A. Limousine Operators*, [1979] OLRB Rep. Aug. 810 an individual employee filed a complaint with the Board alleging that his employer had breached sections 56 (now 64) and 58 (now 66) of the Act. The employee maintained that he had

been discharged from his employment because his employer thought he had been active in the formation of a trade union. The employer challenged the employee's status to bring the complaint because no trade union had joined the employee in the filing of his complaint. The Board upheld the employer's objection, in part, and dismissed that aspect of the complaint alleging a breach of section 56 (now 64) of the Act. The Board held that a complaint alleging interference with the trade union must be brought by a trade union and not an individual employee. At p. 811 the Board said,

While the Board in *A.A.S. Telecommunications, supra*, was dealing with a managerial person it is clear from its statement that a section 79 complaint alleging a violation of section 56 of the Act must be brought by a trade union and cannot be brought by an individual employee. For this reason, the complaint in respect of section 56 in the instant case is dismissed.

The basis of the Board's decision in *T.I.A. Limousine Operators* denying the individual the opportunity to bring an application under section 64 of the Act is that section 64, which precludes employers from interfering with trade unions, protects union rights as distinct from employee rights. Notwithstanding the absence of the union, however, and as long as the individual was established to be an employee under the Act, the Board was willing to entertain his individual complaint under section 66 of the Act to protect his own right not to be discharged for union activity.

8. In *Central Park Lodges of Canada*, [1980] OLRB Rep. Oct. 1373 the Board held that individual employees may not ask the Board through section 106(2) of the Act to determine their employee status during the course of bargaining for a collective agreement or during the operation of a collective agreement. At p. 1380 the Board stated,

The scheme of the Act, the decided cases, and the ramifications of an alternative interpretation, all support the inference that section 95(2) [now section 106(2)] was only intended to resolve disputes between the immediate parties to the bargaining relationship, [the employer and the union].

For similar decisions under section 106(2), see *Indusmin Limited*, [1975] OLRB Rep. March 184; *York University*, [1978] OLRB Rep. Aug. 790 and *Wallace Barnes Limited* (1961), 61 CLLC ¶16,198.

9. On a similar basis the Board in *Canadian General Electric*, [1980] OLRB Rep. Aug. 1179 stated that it would not inquire into the complaint of an individual employee alleging that his employer had breached its duty to bargain in good faith. In reaching its decision the Board emphasized that the duties and obligations found in section 15 of the Act are of legal interest to the employer and the trade union only, the two parties to the collective agreement, and not the individual employee.

10. While certain provisions of the Act such as sections 15, 64 and 106(2) either embody union rights only or focus on the collective bargaining relationship between the union and the employer, section 66 establishes individual employee rights as well as union rights. Section 66(a) precludes an employer from refusing to employ or continuing to



employ *a person* or from discriminating against *a person* in regard to employment or any term or condition of employment because the person was or is a member of the trade union or was or is exercising any other rights under the Act.

11. No provision in the Act stipulates that a complaint alleging a breach of section 66(a) may only be brought by a trade union. Presumably, in this instance, if the complaining employees were not represented by a union, the respondent would not object to the employees' status to initiate the instant complaint. Is the fact that the employees in this matter are represented by a trade union sufficient to deprive them of their ability to individually complain to the Board to protect their individual rights not to be discriminated against for their union affiliation.

12. Counsel for the employer argues that unless the employees couple their complainant against the employer with a complaint against the union for failure to represent them in good faith, the Board should insist that the complaint before the Board be brought by the employees' exclusive bargaining agent. The Board, however, cannot agree. There may be numerous reasons why an employee may decide not to file a complaint against his union even though his union refuses to process a complaint against his employer alleging a violation of the *Labour Relations Act*. The employee may consider that he and his union have an honest difference of opinion as to whether or not the employer has acted contrary to the Act. The employee may realize that even if he were to ultimately prove the employer's breach of the Act, he could never establish that his union had breached its duty of fair representation in view of the extent of union misconduct needed to make out such a complaint. If the Board were to accept the employer's argument in this matter, an employee, in order to protect his rights, would be put in the position of having to file a complaint against his union even if he is of the view that the union has not in fact breached its duty of fair representation as that duty has been interpreted by the Board. Not only would this approach encourage the filing of vexatious complaints but also, in the Board's assessment, it would run counter to the aims of the *Labour Relations Act* to require an employee to proceed against his union simply and only to enforce his individual rights, established by the Act, vis a vis his employer.

13. Moreover, even if an employee could establish that his union had breached its duty of fair representation, the employee, in an effort to nurture and improve his relationship with his union rather than exacerbate it, may want to handle his problem with his union on an informal basis, without resorting to the adversary process of the Act. The Board is most reluctant to exercise the discretion it has under section 89 of the Act to refuse to entertain a complaint where the natural effect of the refusal would be to force the employee to proceed against his union in order to enforce his individual rights under section 66 of the Act.

14. The Board has previously allowed individual employees to proceed with complaints against employers when the complaint has involved an alleged breach of section 66 of the Act. In *Kingston Vending Limited*, [1976] OLRB Rep. Oct. 602, for example, the Board entertained a preliminary objection similar to the instant objection: the employer objected to the status of an individual to bring a complaint under section 58(a) (now section 66(a)) of the Act. The employer in *Kingston Vending* maintained that for an employee to have status to file a complaint against his employer under section 66(a) of the Act, he would first have to establish that the union had breached its duty of fair representation. The Board dismissed the objection and determined that an employee



could file a complaint under the Act alleging an employer breach of section 66 of the Act without first having to establish that the union had breached its duty of fair representation. It is apparent from its reasoning that the Board further considered that it was not even necessary for the employee to file a concurrent complaint against his union in order to proceed against his employer under section 66 of the Act. At p. 603 the Board stated the following,

Secondly, dealing with the merits of the respondent's objection, the Board accepts the view expressed by counsel for the union in its written submission that section 58(a) [now section 66(a)] of the Act gives rights to employees as individuals and that the scope of section 79(1) [now section 89(1)], which authorizes the Board to inquire into *any* complaint, does not limit the remedial powers of the Board by requiring that the complaint originate with a trade union.

Moreover, the overall scheme of the Act would indicate that the protection of the rights of employees can be affected otherwise than through a trade union. While the great bulk of the proceedings before the Board may involve trade unions, it is worth remembering that section 92(2) of the Act provides for the appointment of Board Members in equal numbers "representative of employers and employees" and not of employers and trade unions.

One of the mischiefs that The Labour Relations Act was meant to correct is the threat to the livelihood of an individual for engaging in union activity. In the present economic order an individual's job may be of greater value to him than many forms of conventional property. Therefore, the unlawful taking of his job may call for legal remedies as ample, effective and available as those legal remedies fashioned to protect his property. In our view, if the legislation had intended to circumscribe the remedial rights of individuals in a manner as narrow as that suggested by the respondent, it would have done so expressly. We are not prepared to do so by deduction or inference.

(See also *T.I.A. Limousine Operators* discussed *supra*.)

15. In *John Christopher and Pre-Fab Cushioning & Vita Form Ltd.*, (file no. 0097-76-U, unreported decision dated June 11, 1976) the Board entertained an individual employee's complaint against his employer and refused the respondent employer's request that the Board draw an adverse inference from the union's failure to support the employee's complaint that the employer had discharged him because of his involvement with the union. At paragraph 2 of its decision the Board said,

[The] U.E. applied to be certified as bargaining agent on behalf of a unit of employees of the respondent on January 7, 1976. The application resulted in a certificate being issued to U.E. on April 6, 1976. The complainant ceased to be employed by the respondent on or about March 12, 1976, and his complaint was filed on April 14, 1976. Counsel for the respondent submitted that the Board should draw an inference as to the merits of the complaint from the fact that

the complainant was not being represented by U.E.. The Board, however, declines to draw any such inference, and will instead proceed to determine the complaint solely on the basis of the evidence before it.

(See also *Sammy Lovano and Pre-Fab Cushioning & Vita Foam Ltd.*, file no. 0085-76-U, unreported decision dated June 18, 1976).

16. Having regard to the Board's jurisprudence and the considerations set out above the Board denies the employer's preliminary motion and will inquire into the complaint of the 16 employees alleging that the employer has breached section 66(a), notwithstanding that the employees' bargaining agent has not joined them in their complaint and notwithstanding that the employees have expressly declined to bring a concurrent complaint against their union. To do otherwise would do violence to the scheme of the Act and the protection it gives employees to engage in union activities. For the reasons contained in *T.I.A. Limousine Operations*, however, the Board will not inquire into that aspect of the complaint alleging a breach of section 64 of the Act.

17. Turning to the second aspect of the employer's preliminary objection, the Board is further satisfied that this is not a situation where it would be appropriate to defer to arbitration. While the employees maintain that the employer has violated an article of the collective agreement, the essence of the employees' complaint is an alleged breach of the *Labour Relations Act*. The employees maintain that the employer is acting with anti-union animus and attempting to destroy the union through the manner in which it is assigning work. The collective agreement does not contain a "non-discrimination" clause prohibiting the employer from discriminating against employees for their union affiliation. The Board is satisfied that the employees have selected the proper forum for the adjudication of their complaint and declines to defer to arbitration for the resolution of a grievance which may or may not ever be carried to arbitration by the union.

18. On the basis of the foregoing the Board dismisses the employer's preliminary objection.

19. The matter is referred to the Registrar to be scheduled for hearing.

#### **DECISION OF BOARD MEMBER, JAMES A. RONSON;**

1. Contrary to the original style of cause, no complaint has been filed by the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local No. 304. Rather, this is a complaint by 16 employees of the respondent Dufferin Aggregates, A Division of St. Lawrence Cement Inc. (also amended at the hearing), who are dissatisfied with their union and their employer. They complain that their employer has violated sections 3, 64, 66, 70 and 80 of the Act, by giving the work they usually perform to the respondents Torres Transport Limited and Nick Torres. The particulars of their complaint are attached to this decision as Appendix "A". Counsel for the employees acknowledged that the union has not filed a complaint and the union agreed that it had not filed a grievance on the issues nor was it adopting the complaint as its own. Nevertheless, the union submitted, the Board should hear the complaint in spite of the fact the union is not a party.

2. The employer has requested that the Board exercise its discretion and refuse to accept the complaint:

- (a) unless or until the employees make a complaint against their union under section 68; or
- (b) if the employees choose not to complain under section 68, to defer to the arbitration process.

3. The Act envisages, and the Board in its expertise has always applied the concept that disagreements arising out of the interpretation of a collective agreement are best decided using the arbitration procedures found in the collective agreement or the *Labour Relations Act*. Within the last 3 years or so the Board has taken jurisdiction in cases where previously it would have deferred to arbitration, usually on the basis that an unfair labour practice was the basis of the complaint or an important interpretation of the Act was involved and the Board felt it should enunciate. This is not the case here. Even the union does not complain that it has been treated unfairly although that is the substance of the employees' complaint when one reads their allegations.

4. More frequently now, we are seeing cases before the Board where a party unable to arbitrate a difference or sensing that it has a weak case to take to arbitration, comes instead to this Board. Probably this is done in the hope that by tarring the employer with the anti-union brush, the Board will respond to its plight by applying the feathers. With this case my colleagues issue an open invitation to applicants to take advantage of this possibility.

5. Recently again, the Board has strengthened and reinforced the position of the union as the exclusive bargaining agent of the employees. Unions can enter into binding collective agreements even though a majority of employees have voted against the deal. And an employer cannot ignore the union and attempt to deal directly with its employees. So where does this "exclusivity" leave an employer? By this decision, my colleagues say that the exclusive agency of the union to bargain and interpret the collective agreement affords the employer no protection whatsoever. It can still be brought before the Board (with attendant loss of time and cost) to answer the complaints of its employees who are dissatisfied with their union. The *Labour Relations Act* contains other remedies for employees who find themselves in this position.

6. Employers should be able to talk to a union and rely on the union's authority to speak for the bargaining unit without fear of being "sand-bagged" by the union and its members/employees. That is what is happening here, when we don't force the union to take a position on the section 66 issue. Exclusive bargaining rights have no corresponding bargaining obligations for the union. In the circumstances of this case and in the exercise of our discretion, I would defer matters to arbitration under the collective agreement; or if the union refuses to file a grievance, require that a complaint under section 68 of the *Labour Relations Act* be filed, before proceeding further.  
[Appendix "A" attached to Board Member Ronson's decision containing the material facts and particulars in the complaint has been omitted.]

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**0011-82-M; 0041-82-R** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Inducon Development Corporation**, Inducon Construction (Northern) Inc., and Inducon Design/Build Associates, Respondents; Eduino Ribeiro, Applicant, v. Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963 and 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, Respondent, v. Inducon Development Corporation, Inducon Construction (Northern) Inc. and Inducon Design/Build Associates, Intervener

Construction Industry - Construction Industry Grievance - Petition - Termination - Hiring of non-union employees after 1980 statutory extension of provincial agreements contrary to provincial agreement - Not having status to apply for termination by virtue of *April Waterproofing* principle - Those hired before not losing employee status by absence of union membership as required in agreement - *Culliton III* followed - Employees not given reasonable notice of obligation join as union members - Petition response to threat to jobs by union grievances alleging non-union hiring - Co-operation received from management not affecting voluntariness of termination petition

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members I. M. Stamp and B. K. Lee.

**APPEARANCES:** Douglas J. Wray and Frank Rimes for the Carpenters' Union; E. A. Du Vernet, Q.C. and Joseph Watson for Inducon Development Corp; D. N. Corbett, R. W. Cosman, Bob Thornton, Tom Pettypiece and Bob MacKay for Inducon Construction (Northern) Inc. and Inducon Design Build Associates; J. A. Menzies, Q.C. and Eduino Ribeiro for the employees.

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER I. M. STAMP;** July 28, 1983

### I - THE HISTORY OF THE APPLICATIONS

1. These consolidated matters involve the referral of a grievance to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*, and an application for a declaration terminating bargaining rights, pursuant to the provisions of section 57(2) of the Act. A related matter, being the referral of a grievance to the Board in File No. 1437-80-M, is presently before the Courts, and it is recognized that a decision in the employer's and group of employees' favour could render the present applications academic. The parties agreed, however, that the Board should proceed to render its final decision on the two matters involved herein, without regard to the status of the other Board File in the Courts. Prior to doing so, however, it is necessary for the Board to review in brief the history of these parties' relationship.

2. At issue are the bargaining rights for the Carpenters' District Council, on behalf of its affiliated Locals, and the Inducon group of companies. Throughout these proceedings the parties referred to the Inducon group simply as "Inducon", and the Board, for ease of reference, will continue to do so. Inducon is an employer based in the



Toronto area and historically carried on its business primarily within the area of southern Ontario. It originally had no bargaining relationship with any Local of the United Brotherhood of Carpenters and Joiners of America. A review of the facts set out in the decisions of the Board and of the Divisional Court in proceedings related to Board File No. 1437-80-M indicates that in 1970, Inducon entered into a contract in Northwestern Ontario, outside its usual geographical area of work. The contract was to build a school in the District of Rainy River in the Town of Fort Frances. Inducon employed three local carpenters on that project. In November of that year, Local 1669 of the United Brotherhood of Carpenters and Joiners of America applied for and was refused certification with respect to the three carpenters. On December 24, 1970, however, Inducon agreed to enter into a voluntary collective agreement with Local 1669 that covered the school project then underway. It was that single decision on the part of Inducon which would eventually bring the parties to where they are today. Inducon went on to engage in two other school projects in the District of Rainy River, prior to completing its work and leaving the District in 1974. Since that time, Inducon has performed no construction work in the area of Local 1669. In February of 1973, Inducon had advised Local 1669 that it would not be negotiating a new collective agreement when the initial one expired. Local 1669 did not serve notice to bargain, and on April 30, 1973, the collective agreement was allowed to expire according to its terms.

3. In March 1978, consequent upon amendments to the *Labour Relations Act* introducing province-wide bargaining in the ICI sector of the construction industry, the Carpenters' Union wrote to Inducon indicating an intention to negotiate a new agreement with reference to the geographical area of Local 1669. Neither party followed up on this correspondence. Further amendments to the Act, effective May 1, 1980, extended existing bargaining rights on a province-wide basis, and on July 18, 1980, the Carpenters' Union again wrote Inducon and indicated that it was of the view that Inducon was bound by the Carpenters' Provincial Agreement. Inducon did not reply to this correspondence. As a result, the Carpenters' filed a grievance on August 19, 1980, under the terms of the Provincial Agreement. That was the grievance which was referred to the Board (together with a section 1(4) application) in File No. 1437-80-M, and complained of a violation of the subcontracting provisions of the provincial agreement.

4. The Board issued its decision in that file on March 11, 1982. The Board rejected Inducon's argument of "abandonment", found the Inducon group of companies before it to be "related employers" for the purposes of the Act, declined to give any weight to a petition against the Carpenters' Union filed by the incumbent employees of Inducon, and found Inducon, by virtue of section 137(2) of the Act, to be bound province-wide to the Carpenters' collective agreement. Section 137(2) was part of the 1980 round of amendments referred to earlier, and provides:

Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction

industry referred to in clause 117(e), except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

The employer immediately made application for judicial review of the Board's decision, primarily on the ground that the Board had interpreted section 137(2) (as well as section 1(4)) in a manner which rendered the question of employee support for the trade union irrelevant. The Divisional Court, in reasons for judgment released February 2, 1983, dismissed the employer's application (which had been joined in by the employees) and made these comments concerning section 137(2):

... The applicants submit that the interpretation given this section by the Board is patently unreasonable in that it, again, violates a fundamental principle of the Act that ensures employers the freedom to be represented by an employers' organization of choice (Section 4). Section 137(2) was enacted by the *Labour Relations Amendment Act, 1979*, S.O. 1979, c.113. It is part of a legislated scheme of province-wide bargaining in the ICI sector of the construction industry which was first introduced by the *Labour Relations Amendment Act, 1977*, S.O. 1977, c.31. Section 137(2) is a specific enactment designed to effect a province-wide extension of bargaining rights of all affiliated bargaining agents of the carpenters and others in the ICI sector. Its invocation is premised on the existence of local area bargaining rights. In this case the Board has found that such rights originated with the collective agreement between Local 1669 and ICCL which terminated 30 April, 1973. The finding that these rights were not abandoned is the threshold [sic] decision and it is a decision within the Board's exclusive jurisdiction. See *Carpenters' District Council of Lake Ontario and Hugh Murray (1974) Limited and John Entwistle Construction Limited*, (1980) 33 O.R. (2d) 670 per Southey, J. at 667. This finding was not questioned in this Court. It is a finding based in part on the Board's understanding of the body of jurisprudence that has developed around the collective bargaining system in the construction industry. Absent attack on that finding, the provisions of section 137(2) apply automatically by operation of law, and, the Board is given no discretion in limiting the province-wide application thereof. The interpretation is not patently unreasonable, given the wording of section 137(2). The legislature has provided that "the employer shall be deemed" to have recognized all the affiliated bargaining agents represented by a certified employee bargaining agency. While an employer might well consider this provision an interference with its right to collectively bargain with a freely designated representative of its employees the legislature has seen fit to limit that right in the interests of attempting to make collective bargaining responsive to the needs of the construction industry. This section in effect provides that if an employer is bound by a provincial collective agreement anywhere in the province, that employer is now bound everywhere in the province to that agreement where it

employs persons in the trades in the ICI sector of the construction industry. This is an essential part of a scheme of legislation to provide effective province-wide bargaining leading to a provincial agreement in this sector of the industry.

Inducon and the employees thereafter sought, and have received, leave to appeal to the Court of Appeal.

5. During the course of these events, the Carpenters' on February 23, 1982, prior to issuance of the first Board decision, filed with Inducon a second grievance, which is the grievance before the Board in the present matter. That grievance reads:

NATURE OF GRIEVANCE:

Company employing non-members of the union to perform bargaining unit work and not hiring through the union office.

ARTICLE (S) OF AGREEMENT ALLEGED TO HAVE BEEN VIOLATED:

3, 5 and any other relevant Article.

REMEDY SOUGHT:

Declaration that collective agreement has been violated; that non-members and persons not hired through offices of the District Council be terminated; that the company hire through the union office; any other remedy that may be appropriate.

This grievance was lodged with the Board on April 1, 1982.

6. Meanwhile, the employees in question were apparently taking steps of their own. On March 11, 1982, the day the Board was issuing its initial decision in the union's favour, the employees met with their solicitor and signed a "Termination Application" to have the Board declare the bargaining rights of the Carpenters' Union at an end. This application was filed with the Board on April 6, 1982, and in an earlier oral decision was found by the Board to be timely. The application is stated to be in the alternative to the position taken by Inducon and the employees in Board File No. 1437-80-M; that is, that the Carpenters' Union has no bargaining rights to begin with. Similarly, for the purpose of allowing the Board to proceed with both the second union grievance and the employees' termination application, Inducon agreed, without prejudice to its position before the Courts, that it was at all material times bound to the Carpenters' Provincial Collective Agreement, and that it has been employing carpenters who perform work covered by the Collective Agreement. The company and the union also agreed to defer for future consideration the issue of what damages, if any, would flow from the company's admitted breach of the Collective Agreement. This left only the evidence concerning the voluntariness of the termination application itself to be heard by the Board, together with the various arguments of the parties.

## II - THE STATUS OF THE "EMPLOYEES"

7. The union argues firstly that the employees who have brought the termination application lack the status to do so, in view of the fact that they are being employed in violation of the collective agreement. In support of this position, the union points to *April Waterproofing*, [1980] OLRB Rep. Nov. 1577; *T. E. Leroux Contracting*, [1982] OLRB Rep. Aug. 1204; *Cooper Construction*, [1982] OLRB Rep. Aug. 1152; *Folgor Construction*, [1982] OLRB Rep. Mar. 377; *Graphic Centre*, [1977] OLRB Rep. June 379; *Beef Terminal (1979) Ltd.*, [1981] OLRB Rep. Mar. 244.

8. The hiring dates for the 19 carpenters employed on the date of the termination application are as follows:

Antonio F. Moniz	Dec. 1, 1965
Antonio P. Amaral	Mar. 1, 1966
Jose Domingos	Nov. 27, 1967
Rafael Carvalho	Jan. 1, 1968
Henrique Maciel	April 15, 1971
Manuel M. Marchao	Nov. 20, 1973
Manuel Maciel	Dec. 15, 1973
Eduino Ribeiro	Mar. 24, 1977
Joe Amaral	Aug. 22, 1977
Norberto DaRosa	Sept. 19, 1977
Manuel F. DaRosa	Oct. 31, 1977
Manuel M. S. Santos	June 15, 1978
Helmut Staudinger	Oct. 6, 1980
Jose M. Neves	Jan. 19, 1981
Manuel Gaspar	Jan. 19, 1981
Antonio Marcos	Nov. 23, 1981
Joseph (Guiseppe) Vespa	Dec. 14, 1981
Joaquim Ribeiro	Dec. 23, 1981
Isidro Mendes	Jan. 28, 1982

As can be seen, 12 of the carpenters were hired prior to the union's assertion of province-wide bargaining rights in July of 1980. The remaining 7 were hired between the date of that claim/grievance and the Board's ruling on the grievance in March of 1982. As it happens, one of the nineteen carpenters, Mr. Carvalho, has been a member of the Carpenters' Union since 1968, and continues to be so today. While a supporter of the petition, Mr. Carvalho testified that he has kept up his union membership as a form of "insurance". He was not, however, hired by Inducon through the Union, as required by the terms of the collective agreement. The Board in *Eton Construction Ltd.*, [1981] OLRB Rep. July 872, made it clear that even a union member hired other than through the channels required by the agreement is nonetheless a person employed in violation of the collective agreement. Probably in recognition of that, no party in the present case took the position before the Board that Mr. Carvalho enjoyed any different status than the other petitioners by virtue of the happenstance that he was a member of the Carpenters' Union.

9. The articles of the collective agreement relied upon by the union in its



grievance, and as an extension of that, its argument on status vis-a-vis the termination application, are as follows:

**3.01** The EBA recognizes the Union as the sole and exclusive bargaining agent for all journeymen and apprentice carpenters, other than millwrights, engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario for whom the Union has bargaining rights.

**5.01(a)** The employer agrees to hire and continue to employ employees covered by this Agreement who are members in good standing of the United Brotherhood of Carpenters and Joiners of America as long as the Local Union or the District Council of the United Brotherhood of Carpenters and Joiners of America in the Province of Ontario can supply qualified employees in sufficient numbers who are capable of performing the work required.

**(b)** Except as modified by the provision of sub-section (c) of this Article, all employees covered by this Agreement shall be hired by the employer through the offices of the Local Unions and District Councils having jurisdiction over the geographical area, set out in Schedule "B", where work by the employer is to be performed. Such hiring shall be done by way of a referral slip issued by the Local Union or District Council.

**(c)** It is understood that, if the Local Union or District Council is unable to provide the required manpower within two (2) working days, the employer is free to hire such manpower as is available, but such manpower shall, as a condition of employment, either be in good standing or apply for membership in the Union within seven (7) days.

When the Board's March 11, 1982 decision was handed down, the company moved immediately in the Courts for judicial review. It first sought leave to have its application heard on an "expedited" basis, i.e., by a single Judge sitting in Weekly Court, citing the jeopardy its existing complement of employees had been placed in. The employees, through their own solicitor who had represented them at the Board hearings, joined in the company's application and filed individual employee affidavits in support thereof. The Court denied the company's request for an expedited hearing, but expressed its concern for the possibility of the discharge of the incumbent employees, and, *ex proprio motu*, granted a stay of any proceedings consequent upon the Board's order under review (decision of Hughes, J., issued orally on March 25, 1982; reasons for judgment issued April 27, 1982). When the company's application for judicial review finally was heard by the Divisional Court on December 15 and 16, 1982, it was dismissed. With respect to the position of the employees, the Court observed:

Turning to the employees' application, it is apparent for the reasons indicated that we are of the view that the Board quite properly did not take into consideration their wishes and desires in applying

section 137(2). While we have some concern as to the impact of the Board's decision when viewed from the perspective of consequential results on the employees we recognize that such a concern is one that does not affect the jurisdictional issue herein. We do feel however, that if the Board were to invoke and apply the sanction requested in the grievance, as above indicated, the result may well be considered iniquitous. We recognize, however, that that is a decision for the Board and that although the consequential result to the employees may be regretted it is one which does not raise a jurisdictional issue in this matter.

10. But the concerns expressed by the Court had, by that time, already been considered and acted upon by the Board in the case of *Culliton Brothers Limited*, [1982] OLRB Rep. Nov. 1602. In that case, the employer, a company located in Stratford, had in 1976 taken on a job located in the City of Cornwall. The local Sheet Metal Workers Union during the course of that job applied for and received certification for the Board's geographic area encompassing Cornwall and vicinity. From that point, both the company and the union had for some time proceeded in ignorance of the effect of an outstanding accreditation order for that geographic area. Following the 1980 amendments to the province-wide bargaining provisions of the Act, the union took the position that the company was automatically bound throughout the province to its collective agreement, and grieved. At that point the only employees of the company were five of the company's "core" employees working in Stratford, who had been hired well before the "deemed recognition" provisions of section 137(2) extended the union's bargaining rights to the area of Stratford. The province-wide collective agreement in that case provided:

## ARTICLE 2 - DEFINITIONS

In this Agreement:

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**2.6** "employee" means a certified journeyman sheet metal worker or registered apprentice, as well as sheeter/decker, welder, sheeter's assistant and material handler engaged in the sheeting and decking segment of the sheet metal industry; recognized by the local union and employed in the shop or on the job site except as otherwise specifically provided in this Collective Agreement.

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**2.8** "member" means a certified journeyman sheet metal worker; sheeter/decker, welder, sheeter's assistant and material handler in the sheeting and decking segment of the sheet metal industry, recognized by the local union and employed or eligible to be employed by an employer in the shop or on the job site.

## ARTICLE 8 - UNION SECURITY

**8.1** The employer agrees it shall be a condition of employment for all employees covered by the terms of this Agreement, to be a member of, and to maintain membership in good standing, in one of the local unions.

## ARTICLE 21 - HIRING PROCEDURE

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**21.2** Whenever after reasonable notice, (48 hours) excluding Saturdays, Sundays and Holidays, the local union is unable to furnish a sufficient number of such duly qualified members and registered apprentices recognized by the Union, to meet the requirements of the employer, then the employer may secure such additional sheet metal workers from other sources as may be necessary, it being understood that they shall be eligible and shall comply with the requirements of the Union and thus become covered by the terms of this Agreement.

The Board, in a decision dated March 17, 1982, reported [1982] OLRB Rep. March 357 ("*Culliton I*"), found that section 137(2) of the Act applied to bind Culliton to the provincial collective agreement. With respect to the consequent position of Culliton's existing complement of employees, the Board at that time wrote at paragraph 22:

22. The position of the respondent's present employees who are not members of the applicant raises an important question. In section 137(2), the Legislature extended bargaining rights by means of deemed recognition of affiliated bargaining agents. This section is silent on the wishes of such employees. It was not suggested that the applicant is under any requirement either to offer these employees membership or not to require the termination of their employment with the respondent.

The Board then indicated that the question of the position of the existing employees could be dealt with at a subsequent hearing, at the same time as the issue of damages.

11. Those issues were in fact dealt with in a second decision of the Board, reported [1982] OLRB Rep. Nov. 1602 ("*Culliton II*"). With respect to the employees, the Board observed the following:

The relief sought by the Conference with respect to the five employees was set out in the following terms in the letter from its solicitors dated January 25, 1982 advising the respondent that the grievance filed in the January 14th letter was being referred to the Board.

"An order that Culliton employ only members in good standing of the affiliated local unions of the Conference to perform work in

connection with any of its Projects in accordance with the Provincial Agreement and the Appendices thereto."

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"An Order that Culliton cease and desist from employing or continuing to employ persons at any of its Projects who are not members in good standing of any of the affiliated local unions of the Conference.

At the hearing counsel for the Conference asked that the Board direct the respondent to discharge the five employees because they are not members of a constituent local of the Conference as required by Article 8 (see paragraph 16 above).

The Board then continued as follows, at paragraph 38:

38. ... if the respondent is employing employees who are not in compliance with Article 8 of the provincial agreement, Local 473 is within its rights to direct the respondent to discharge the employees and to bring a grievance if it fails to do so....

39. Does this mean that Local 473, had it been aware of its bargaining rights on May 1st, 1980, would have been entitled to have this Board direct the immediate discharge of the four employees for non-compliance with Article 8 if it had filed a timely grievance to this effect? The answer to that question, in the Board's view, would depend on whether Local 473 had given them notice of their obligation and of the fact that it would be seeking their discharge if they did not satisfy the obligation. The entitlement to notice of the obligation and the reasonable opportunity to respond is implicit in the awards of arbitrators who have granted discharge as a relief for violation of union security provisions of a collective agreement. Generally arbitrators grant that relief only after satisfying themselves that the union has acquitted itself properly of any obligation and then they make the discharge conditional upon the employee failing to join the union within a specified time period. In other words discharge takes effect if employees fail to heed the notice that they are obligated to be members of the union and will be discharged if they fail to become members....

40. This approach of arbitrators to violations of the union security provisions in collective agreements has developed largely in the context of industrial unions and with respect to collective agreements negotiated directly between an employer and the bargaining agent for its employees. Thus in that context arbitrators were dealing with union security provisions which had been arrived at by the mutual consent of the contracting parties directly affected by them. The context herein is one in which the parties affected, particularly the



employees and their employer, find themselves bound on May 1st, 1980 by force of statute to the provincial agreement, a collective agreement in which they have had no voice in negotiating. The Board cannot accept that these employees would be entitled in such circumstances to any less consideration than arbitrators have given to employees bound by union security provisions arrived at by the mutual consent of their bargaining agent and their employer. Having regard to the overall scheme of the act, it is inconceivable that sections 137(1), 137(2), 145(4) and 147(2) could be seen to operate in a manner which would deny the respondent's employees reasonable notice of their obligation with respect to union membership and the opportunity to act on that notice and join the union if that is their decision. If they were given that opportunity and failed or refused to act on it to join the union, then the union would be entitled to demand that the respondent discharge them and in which case they would have to be dismissed.

The Board then considered the facts which it had found at an earlier point in the decision, namely, at paragraph 15:

15. The respondent has not attempted to hire members of the Conference or its constituent locals since it received the Conference's January 14th letter. Nor has it acted to terminate the employment of the five employees, but following the March 17th decision, it did advise them that they should apply for membership in the Association. This advice was given after the respondent consulted with its solicitors. The respondent did not pursue the matter any further after it received notice of the application for termination of bargaining rights. The employees were not approached by the Conference or any of its locals with respect to joining the Association or with respect to the requirements of membership contained in Article 8 of the provincial agreement.

The Board noted that its determination of the impact of section 137(2) on existing employees had not previously been decided, that the union itself gave no notice to the employees of the options that they faced, and that the first Board decision refrained from dealing definitively with the position of the employees. In the result, the Board found that the first clear notice to the employees of the choice which they had to make was in the form of that decision itself, and accordingly afforded the employees five days from the issuance of the decision to make application to the union for membership (failing which, the union could demand their discharge, pursuant to the collective agreement).

12. The Board in *Culliton II* found that at the same time as section 137(2) had the effect of extending the union's bargaining rights (and collective agreement) for the employer Culliton to all areas of the province, all of the existing employees of Culliton "became employees in the bargaining unit of the provincial agreement and were bound by it" (paragraph 37). That conclusion was not reached in the context of a termination application. But in an unrelated case dealing with termination application and considered within days of the *Culliton (II)* decision, the Board came to the same conclusion, for the

purposes of section 57(2) of the Act. See *Thomas Construction (Galt) Limited*, [1982] OLRB Rep. Nov. 1727. The issue of “employee” status in the termination application filed for *Culliton Brothers Limited* itself remained to be decided by a third panel of the Board, decision reported [1983] OLRB Rep. March 339 (“*Culliton III*”). Clearly, therefore, that particular issue at this point in time cannot be treated as one of first impression.

13. The Board in *Culliton III* carefully considered the line of authority put forward in this case by the Carpenters’ Union in support of the submission that the *pre*-hired employees are not to be treated as “employees” for the purposes of section 57(2) of the Act. In rejecting that argument in the context of section 137(2) of the Act, the Board observed, at paragraph 18:

18. ... None of the employees “swept in” by section 137(2) had ever indicated any desire for trade union representation. Should we conclude that on May 1, 1980 the union not only acquired the right to represent them, but also that they should be denied the fruits of that representation until such time as they sought and were accepted into membership? On this view, for practical purposes, the province-wide bargaining scheme has not been extended at all. It simply opens the possibility of replacing longstanding employees with members of the union. We do not think that that was the legislative intention and, in this respect, we agree with the result set out in the second decision of the Board in the previous proceeding. (See paragraph 37, where the Board found that the employees were “employees in the bargaining unit of the provincial agreement and were bound by it”).

19. In our view, when the non-union employees of Culliton were swept into the province-wide bargaining scheme, it was intended that they be regarded as employees in the bargaining unit defined in the agreement and possessing all of the rights, privileges, and obligations of any other employee under the Act represented by the union. If they did not join the union they could be terminated, because that is what the agreement required. But as employees in the bargaining unit they could also seek a termination of the union’s bargaining rights in accordance with the provisions of section 57.

14. The Board in *Culliton III* carefully distinguished the case before it from the facts in, e.g., *April Waterproofing*, [1980] OLRB Rep. Nov. 1577, where the employment of certain individuals was unlawful *from the beginning*; i.e., the employment relationship could not be formed without a violation of an already existing collective agreement. In *April Waterproofing*, the employer, just at the onset of the “open period”, hired two employees from a rival union in knowing violation of its existing collective agreement. A “displacement” application for certification by the rival union followed immediately. In refusing to find that the two persons illegally hired were “employees” in the bargaining unit for the purposes of the Act, the Board signalled its concern, later articulated further in *Thomas Construction (Galt) Limited*, *supra*, at paragraph 9, that such employer conduct creates:

9. ... a possible method of easy abuse by employers, particularly in the construction industry in relation to representation matters before

this Board. Thus, for example, on a termination case an employer could choose to avoid his obligations under a collective agreement to seek employees from a trade union's hiring hall and employ persons from either another trade union or totally antithetical to construction trade unions at the time when the open period for the collective agreement is approaching. In such circumstances, it would not be surprising if another union were to apply for certification or if the employees were to apply for termination of bargaining rights. The employer would have "fostered" such a representation application by laying the necessary ground work simply by avoiding his collective bargaining obligations with the trade union representing employees in a particular bargaining unit.

Thus the Board has not failed to interpret the Act in a manner which renders such conduct ineffectual, without requiring (it will be noted from *April Waterproofing* and the *obiter dicta* of *Culliton III*) further inquiry into the motive of the employer. Such employer initiatives so obviously place a union's bargaining rights in jeopardy that the employer is presumed to intend the natural consequences of his acts. As the Board noted in *Culliton III*, at paragraph 25, conduct of this type on the part of an employer would appear to be a fundamental violation of section 64 of the Act as well.

15. From the Board's analysis, particularly in *Culliton III*, it becomes apparent that the seven employees hired in this case after the 1980 amendments extended the application of the provincial agreement, and after the Carpenters' gave notice to Inducon to that effect, stand in a different position from those employees hired prior. Inducon, in hiring its own employees in the face of that notice, must surely be said to have been acting at its peril. Such employees can be said to have at no time been "properly" or "innocently" hired, and no valid reason exists to cause the Board to treat their status other than as it has, for example, in *April Waterproofing, supra*, and *Beef Terminal (1979) Ltd.*, [1981] OLRB Rep. March 244. Nor do the arguments in *Culliton II* apply to provide these employees with an industrial-like opportunity to make application for membership in the union. Like most construction agreements, the present collective agreement contains not only a requirement of membership, but an obligation to hire through the union hall. While the denial now of a reasonable opportunity to join the union clearly is unfortunate for these seven employees, it must be recognized that they were in all likelihood hired in the stead of unemployed members of the union, at a point in time when, as the employer has been put on notice, those employment opportunities were lawfully reserved for members of the union. As the Board noted in *Culliton II*, at paragraph 18, the right of the union to receive damages for breach of the hiring provisions is dependent upon its right to have required the immediate dismissal and replacement of the non-member employees, and the awarding of damages in such cases as *McKenna Bros.*, 10 L.A.C. (2d) 273, and, more importantly, *Blouin Drywall Contractors Ltd.*, (1975) 8 O.R. (2d) 103 (Ont. C.A.); 4 O.R. (2d) 423 (Divisional Court), 4 L.A.C. (2d) 423, implicitly recognizes such a right.

16. Recognizing that *Culliton III*, and to a lesser extent *Culliton II*, did deal precisely with this issue, counsel for the Carpenters' Union responded to the *Culliton* cases in two ways. He argued, firstly, that they are distinguishable, and, in the alternative, that they are wrong. Counsel argues firstly that to be an "employee" under *this* collective

agreement, it is necessary to be a union member. The portions of the collective agreement which he relies upon are, once again:

**3.01** The EBA recognizes the Union as the sole and exclusive bargaining agent for all journeymen and apprentice carpenters, other than millwrights, engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario for whom the Union has bargaining rights.

**5.01(a)** The employer agrees to hire and continue to employ employees covered by this Agreement who are members in good standing of the United Brotherhood of Carpenters and Joiners of America as long as the Local Union or the District Council of the United Brotherhood of Carpenters and Joiners of America in the Province of Ontario can supply qualified employees in sufficient numbers who are capable of performing the work required.

**(b)** Except as modified by the provision of sub-section (c) of this Article, all employees covered by this Agreement shall be hired by the employer through the offices of the Local Unions and District Councils having jurisdiction over the geographical area, set out in Schedule "B", where work by the employer is to be performed. Such hiring shall be done by way of a referral slip issued by the Local Union or District Council.

**(c)** It is understood that, if the Local Union or District Council is unable to provide the required manpower within two (2) working days, the employer is free to hire such manpower as is available, but such manpower shall, as a condition of employment, either be in good standing or apply for membership in the Union within seven (7) days.

But the language before the Board in *Culliton* provided, if anything, even stronger grounds for that argument, in that it specifically defined both "members" and "employees". In that respect it reads, once again:

## ARTICLE 2 - DEFINITIONS

In this Agreement:

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**2.6** "employee" means a certified journeyman sheet metal worker or registered apprentice, as well as sheeter/decker, welder, sheeter's assistant and material handler engaged in the sheeting and decking segment of the sheet metal industry; recognized by the local union and employed in the shop or on the job site except as otherwise specifically provided in this Collective Agreement.



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**2.8** “member” means a certified journeyman sheet metal worker; sheeter/decker, welder, sheeter’s assistant and material handler in the sheeting and decking segment of the sheet metal industry, recognized by the local union and employed or eligible to be employed by an employer in the shop or on the job site.

Yet the Board in *Culliton III*, bearing in mind its decision in *Culliton II*, felt compelled to the conclusion that the petitioners before the Board were “employees” for the purpose of raising the representation issue under section 57(2) of the Act. The Board in *Culliton II* found that such employees were “employees in the bargaining unit”, and entitled to a reasonable and clear opportunity to make the election open to them. This same conclusion as to the legal status of the incumbent employees was carried through, specifically with regard to section 57(2), in *Culliton III*.

17. Counsel for the Carpenters’ Union argues that the Board erred in *Culliton* in adopting a requirement of reasonable notice prior to discharge, in that such a requirement emanates from arbitral authority in the *industrial* context. He argues that the same approach has no basis in the construction industry, with its standard requirement of hiring through the union and its hiring hall. He refers in support of this submission to the acknowledgment by the Court of Appeal in, e.g., *Blouin Drywall*, *supra*, of the distinctiveness of the construction industry on matters of employment relations. But the statement of the Court in that case, important as it is, cannot be divorced from the specific facts and issue before it. The employer in *Blouin*, while admittedly bound by the collective agreement, had wrongfully hired individuals directly as “trainees”, and the Court was called upon to confirm the right of the union to claim damages generally, from the point of hiring, on behalf of its unemployed members. The Board has, already in this decision, acknowledged the impact of the *Blouin Drywall* case on the seven employees hired in “knowing” violation of the collective agreement. But *Blouin* was not dealing with the case of long-standing and lawfully-hired employees who, by operation of law, had suddenly been faced with a requirement to become members of a bargaining agent, or face discharge. Having regard to the concerns expressed by the Divisional Court in the course of dismissing Inducon’s application for judicial review, the Board senses that the Court would find the same distinction to exist between the two categories of employees as the Board has.

18. Counsel next argues, in the alternative, that the present case is distinguishable from *Culliton* on the question of whether reasonable notice to the employees of their obligations has in fact been given. He argues that both the company and the employees have been on notice since the Board’s first decision in March of 1982 of what was required of the employees, yet both have done nothing to comply. Counsel relies in this submission on paragraph 39 of the Board’s March decision, which observed:

39. The employees and the respondents object to a declaration issuing to the applicant which would have the effect of making the applicant or one of its locals the bargaining agent with their employer or employers. In enacting section 137(2) of the Act, the Legislature made no reference to any consideration to be given to the

unrepresented employees of the employer when the deemed recognition comes into effect. The applicant has not indicated what will be its attitude towards these employees. ... On the one hand, the applicant may offer membership to the employees and, on the other hand, it may require their dismissal pursuant to a union security clause in the current provincial collective agreement. Clearly, it is open to the applicant under union security provisions of the current provincial collective agreement to require the employees to be or become members in good standing of the United Brotherhood of Carpenters and Joiners of America.

Counsel further relies on the affidavit of Robert MacKay, an officer of Inducon, filed in support of the company's request for expedition of its application for judicial review. In that affidavit Mr. MacKay stated in part:

9. The Board, in its decision declared that the Union held bargaining rights for Inducon throughout Ontario and found that Inducon was in breach of the Carpenters' Ontario Provincial Collective Agreement. In particular, the Board found that Inducon was in breach of the Union's security provisions which require the employees of Inducon to be members in good standing of the Union. As a result of the Board's decision, the employees are compelled, without a vote, to become members of the Union, if the Union allows them to be members and allows them to work for Inducon. If not, Inducon must terminate the employees or face a liability of approximately \$15,000 per week, which corresponds to the salaries and benefits payable to employees which the Union will require as damages for failure to employ Union employees.

• • •

11. Now shown to me and marked as Exhibit "B" is a true copy of a grievance filed by the Union for a declaration that the collective agreement has been violated, that non-members of the Union and persons not hired through the offices of the District Council be terminated, that the company hire through the Union office, and for other unspecified remedies that may be appropriate. None of the carpenters employed by Inducon were hired through the offices of the District Council and would all, therefore, have to be terminated by Inducon.

And in support of the same request, the employees' solicitor filed an affidavit which observed:

8. The effect of the Board's decision is that the applicant companies must discharge the Employees without any guaranty being given that they will be rehired. The Employees have made it clear that they want to keep their jobs, which some of them have held for more than 10 years.

19. The Board does not find the above to be sufficient to distinguish this case from *Culliton*. The Board in *Culliton II* recognized (at paragraph 15) that the employees had been advised by their employer, following the Board's initial decision, to apply for membership in the Union. But the Board found that sufficient uncertainty still existed over their options to justify the employees' failure to do so. As the Board also noted in paragraph 15:

... The employees were not approached by the conference or any of its locals with respect to joining the Association or with respect to the requirements of membership contained in Article 8 of the provincial agreement.

There has been no approach made to the employees by the union in this case either. In *Culliton II* it was further noted that the first Board decision itself remained equivocal on the position of the incumbent employees, and the extent of any options which lay open to them. But that first decision did decide that the provincial collective agreement was in effect, and that *Culliton's* failure to employ union members in accordance with its terms was a clear violation of the agreement. What that decision said about the existing employees was, once again:

The position of the respondent's present employees who are not members of the applicant raises an important question. In section 137(2), the Legislature extended bargaining rights by means of deemed recognition of affiliated bargaining agents. This section is silent on the wishes of such employees. It was not suggested that the applicant is under any requirement either to offer these employees membership or not to require the termination of their employment with the respondent.

As can be seen from the passage quoted in paragraph 18 of this decision, the Board in the present case went no further in its March decision than to observe that the trade union "may offer membership to the employees", or it "may require their dismissal". That was prior to the Board having had an opportunity to address the matter fully in *Culliton II*, and appeared to leave the options solely in the hands of the *trade union*. But, as the Board noted in the same paragraph, the union had not yet "indicated what will be its attitude toward these employees". It was still not clear, in other words, what options in fact lay open to the employees. This is not a matter of abstract distinction: the union, to the very close of the hearing before this panel, had deliberately refrained from adopting a position with respect to accepting these employees into membership. The employees themselves, through their solicitor, wrote to the union on March 3, 1983, subsequent to the release of the *Culliton* decision, as follows:

Dear Sirs:

RE: Employees of the Inducon  
group of companies

As you know, I act for the employees of the Inducon group of companies who were made parties in the current proceedings before

the Court of Appeal and the Labour Relations Board concerning your union and the Inducon Companies.

These employees have made their position clear by affidavits and a petition filed in those proceedings and wish to continue as long as possible to assert their position.

They are, of course, concerned also about having jobs. Most of them have been long-time employees of Inducon and wish to continue to work for Inducon.

They are aware, however, that if the current proceedings above referred to are all dismissed you may require them to be dismissed and replaced by current members of your union.

They are also aware of the recent decision in the Culliton case where, in a similar situation, the Board gave the employees time to apply for membership so that they would be able to keep their jobs and still preserve some of their other rights.

I am accordingly instructed on behalf of the employees, my clients, to inform you that having regard to the foregoing and without prejudice to the rights that they may be found to have in any of the current proceedings and in the future which they hereby reserve, the employees, if required to do so by the Ontario Labour Relations Board, and in order to keep their jobs, intend to make application to join the union and would ask for the necessary material for completion and return to you.

We expect that there would be no difficulty in their becoming members of the union.

Yours very truly,

The union did not reply to this letter.

20. The reasons for the equivocation of the union on this point were candidly and realistically put forward by their counsel at the close of the hearing: he observed that the union had no desire to see these employees lose their jobs, but on the other hand, the union was not anxious to take them into membership just so they could terminate the union's bargaining rights. The fact remains, however, that the union *had* refrained from putting forward any offer of membership up to the time *Culliton II* was decided, and since that time the employees themselves have indicated their willingness to apply for membership if that is what is required.

21. Finally, and perhaps the shorter answer to the union's claim that the company should have acted, pursuant to the grievance, to terminate any non-members of the union following the Board's decision in March of 1982, the company correctly points out that that decision was followed almost immediately by the stay of proceedings ordered by the



Court, acting *ex proprio motu*, and that stopover was still in effect at the time that the termination application was filed.

22. For the same reasons given in *Culliton*, the Board here finds the individuals who were in the employ of the company even before the time when the amendments to the Act caused the collective agreement to apply, to stand in a different position than those hired subsequently. The Board finds the former group to be "employees" within the bargaining unit for the purposes of section 57(2) of the Act, and to be entitled to a reasonable opportunity to make application for union membership, in order to preserve their employment.

### III - THE PETITION

23. As a result of the overt participation of the group of employees in the prior proceedings before the Board and the Court, all parties were well aware who the "petitioners" were in this case, and the Carpenters' Union summonsed the bulk of them to appear at the Board as witnesses. As matters developed, however, they were called by their own counsel as witnesses instead. Their testimony covered events and what was obviously for them a major topic of conversation over a period approaching two years, and their evidence on specific matters of detail was far from consistent. In spite of that, however, generally the following account emerges.

24. In the latter part of 1980, talk arose at the work sites of efforts of the Carpenters' Union to be accepted as bargaining agent for the carpenters employed by Inducon. The existing carpenters, by their account, were concerned about this prospect, and began discussing it amongst themselves, both at their work sites and at the company's shop, as well as by telephone when at home. Only one of Inducon's carpenters was at that time a member of the union, and all had, to that point in time, been working at Inducon "non-union". Virtually all of the carpenters were immigrants from mainland Portugal or its affiliate, the Azores Islands, and few spoke English. One who did was Eduino Ribeiro, who has been resident in Canada since 1959. The consensus of the carpenters was that they had best retain a lawyer to advise them, and Mr. Ribeiro volunteered to contact the lawyer who had acted for him in the past on personal matters, including successive purchases of the family home. That lawyer was Alexander Menzies, a general practitioner in the City of Toronto. Mr. Menzies is not Portuguese, but had, prior to this time, obviously gained the confidence of the Portuguese community, as the evidence shows Mr. Menzies to have acted as personal solicitor for a number of the other petitioners as well. It was understood amongst the carpenters that all would contribute to the cost of Mr. Menzies' bill, and the evidence, although varying amongst the witnesses as to specific times, indicates that this has happened.

25. Mr. Ribeiro attended at Mr. Menzies' office to explain the problem, and Mr. Menzies suggested that all of the carpenters sign a petition indicating their opposition to the union coming in. Mr. Ribeiro obtained from the other carpenters their addresses, and wrote all of the names and addresses on a sheet of paper. He then delivered the sheet to Mr. Menzies, who prepared a "petition" document opposing the union. Mr. Ribeiro then took this document away to be signed by the other employees. The other carpenters were spread around the various jobs that the company had going, and in the course of one day Mr. Ribeiro went from job to job to gather the individual signatures. It appears that Mr.

Ribeiro was himself working nights inside an A & P store at the time, but it is clear that many of the carpenters that he visited on the job would have been approached during their working hours. It is also clear that Mr. Ribeiro did not attempt to hide his petitioning activity from either his own superintendent or the superintendents on the other jobs. This petition was then returned to Mr. Menzies and filed with the Board, which was in the course of hearing the union's original section 1(4) application and the subcontracting grievance. That case took 11 days of hearing, and Mr. Ribeiro attended with Mr. Menzies, and en violated; that non-members and persons not hired through offices of the District Council be terminated;

26. The first petition was actually signed and filed with the Board in early February of 1981. In February of 1982, while awaiting the decision of the Board, the union, as noted earlier, filed its second grievance (the present grievance), which specifically complained of Inducon's violation of the "hiring" provisions of the provincial agreement. The remedy sought, once again, was:

Declaration that collective agreement has been violated; that non-members and persons not hired through offices of the District Council be terminated; that the company hire through the union office; any other remedy that may be appropriate.

Mr. Menzies contacted Mr. Ribeiro and suggested that further steps be taken to protect the existing carpenters, in the form of a second petition. Mr. Ribeiro again compiled a list of the carpenters working for Inducon as of the new date, and delivered it to Mr. Menzies. Mr. Menzies then discussed with Mr. Ribeiro a convenient place where he could meet with all of the carpenters at once. The two settled upon the company's carpentry shop, from which tools for special jobs are issued, and to which the carpenters sometimes return at the end of a shift. The keys to the shop are kept by Helmut Staudinger, a former superintendent who now works as a carpenter performing warranty work. The carpenters' boss, Alberto Maciel, has an office at the shop (in addition to the one at Head Office) which he often visits for a couple of hours during the day, but he is always gone from the shop by the end of the shift.

27. At the request of Mr. Ribeiro, all of the carpenters met after the day shift on March 11, 1982, to discuss with Mr. Menzies the second petition, seeking termination of the union's bargaining rights. Mr. Ribeiro arranged with Mr. Staudinger to remain at the shop and leave the doors unlocked for the purpose of their discussion. Mr. Staudinger concedes that a full meeting of *all* of the carpenters had never taken place at the shop before, but testified that he did not see anything improper in it. Mr. Ribeiro acted as interpreter for Mr. Menzies and the other carpenters, and the whole meeting lasted approximately an hour. The second petition was then filed with the Board as the instant termination application.

28. Considerable argument was addressed to the Board on the differing tests to be applied to "petitions" depending on the context in which they arise, in particular in comparing an application for certification with an application for termination of bargaining rights. As the Board has made clear, most recently in *Westinghouse Canada Ltd.*, [1982] OLRB Rep. July 1098, there is only one standard to be met, and that is to satisfy the Board that the petition is voluntary. As a practical matter, however, a

particular context may well make it easier for the Board to be satisfied. Reviewing the various statements of the Board in this regard, the Board in *Ontario Hospital Association (Blue Cross)*, [1980] OLRB Rep. Dec. 1759, noted, at paragraph 31:

31. ... In the case of a termination application, the Board is no less concerned about influence by the employer, but there may, as a practical matter, be any number of reasons, including the mere passage of time, to readily explain the employees' apparent change of hearts. As the Board commented in *N. J. Spivak Limited*, [1977] OLRB Rep. July 462:

6. In contrast to a statement filed in opposition to an application for certification a statement of desire filed in support of a termination application under section 49 of the Act does not represent a sudden change of heart by those who sign it. The operation of section 49, a section designed to give vent to employee desires, requires the passage of at least one year from the date of the union's certification before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49, the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application under section 49 of the Act.

See also *Northern Telecom Canada Limited*, [1979] OLRB Rep. April 330.

29. The present context really goes one step beyond that. Not only has there been no *sudden* change of heart, the carpenters who have always worked for Inducon on a regular basis have *never* indicated any desire to be represented by the trade union. The last carpenters for Inducon having any affiliation with the Carpenters' Union completed their work in 1973, and that was in Rainy River. As in the *Culliton* case, the first steps the existing group of employees saw the ascending union take appeared in no way designed to promote the interests of those particular employees. The Board in *Culliton III* observed:

10. The employees attended all of the hearings in Board File No. 2245-81-M. Initially they were without counsel. Subsequently, they retained their present solicitor who appeared for them at the second hearing and filed this termination application on their behalf. From their point of view, it was obvious that their rights, status, and wishes, were not the union's prime concern. In its pleadings, the union sought remedies which could mean their termination and replacement by union members. The employees did not understand the statutory framework and, not surprisingly, were unenthusiastic about union representation, and apprehensive about the consequences of the

statutory extension of bargaining rights. Mr. Schade testified that he resented the fact that trade union representation was being thrust upon him, and that his first direct contact with the union was in the section 124 application where it sought to have him discharged.

and ultimately concluded:

28. ... The Board is further satisfied that not less than forty-five per cent of such employees have voluntarily signified in writing that they no longer wish to be represented by the union. It is entirely understandable why these employees would be opposed to trade union representation which was not only thrust upon them unwillingly, but also involved an initial effort by their bargaining agent to have them all fired. Their negative reaction is hardly surprising.

A trade union thus acquiring bargaining rights under section 137(2) may in its own interest have to act with some dispatch to counteract this negative reaction, and to provide whatever assurances it thinks fit to the existing employees. But failing such assurances, the Board would need quite cogent evidence of employer domination or interference to conclude that a termination application, in circumstances such as these, would not likely represent the true wishes of the employees themselves.

30. In the present case there have been no overtures or assurances from the trade union at all. All that the trade union did initially was to assert bargaining rights and file a grievance against the company for subcontracting to a non-union company in violation of the provincial agreement. It was not difficult for the non-union carpenters employed at Inducon to divine that their own interests might ultimately be threatened by this line of attack. As Mr. Ribeiro responded to union counsel's questions:

Did you think you were going to be fired when you heard that the Carpenters' were trying to get into the company?

Yes. This is what I, what we all thought, that if the union gets in, we can't work anymore.

Who told you that?

Well we are not members of the union, you see, so if the union gets into the company, how can we work then?

Did anyone tell you you couldn't work then?

No one told me, but I have already been a member of the union and I know how those things work out.

And referring to this later:

Did you discuss that [the night you signed the termination petition]?



Right from the beginning, when we started [the first petition], the issue was discussed.

Those fears appeared to be vindicated when the union filed its second grievance in February of 1982, demanding that "all employees not hired pursuant to the collective agreement be terminated". As another petitioner, Mr. Marchao, described the situation as he saw it:

"The union was trying to steal our job".

If employees had that perception, the union by its conduct had gone a long way toward fostering it. And if, as matters ultimately turn out, that was a misperception, the union did nothing to seek to correct it.

31. According to the employees' evidence, there were, in addition, further reasons underlying the employees' opposition to the union coming in. They had always enjoyed flexibility in their employment relationship with Inducon, for example, in being permitted frequent time off to return for visits to Portugal. In addition, until the most recent economic downturn, they had enjoyed steady, year-round work. From, in some cases, their own prior experience as union members, and in others from the experience of friends, they were afraid that going union would mean long waits on the out-of-work list after a job assignment was completed, or perhaps no job opportunities from the union at all.

32. Given the period of time covered by the employees' testimony, and the fact that two similar petitioning activities were involved, a year apart, the Board does not find the widespread confusion or inconsistencies in the petitioners' evidence to be fatal, bearing in mind as well that many of them would have only a limited grasp of the technicalities of what was going on around them in the first place. It is not surprising that for some, certain incidents and statements may have stood out for them, and for others, different incidents or statements may have done so. Adding to the difficulty in accurately placing statements and events in time is the undoubted fact that this major threat to the employees' security would be the subject of constant and repeated conversation amongst the work force.

33. Beyond this, however, the Board agrees with counsel for the union that many of the petitioners gave their evidence in an "evasive and defensive" manner. Even Mr. Ribeiro tended to be less than forthcoming with all of the facts, unless confronted. And many of the others denied, for example, any knowledge of what the *company's* position was in regard to the union coming in. In light of all that was going on, both in formal proceedings and in general conversation around the work site, such denials are simply unworthy of belief. As Mr. Antonio Amaral, one of the more candid (and senior) of the petitioners put it:

You knew the company didn't want the union to come in?

Yes - many years.

How did you know? Speak to superintendents, bosses?

How many years company been involved in Court cases with the union? God knows.

But how did you know the company didn't want the union?

If I work in the company, I'm not deaf. How I not know what going on? With all those cases ...

Yet many of the employee witnesses (all of whom were excluded while not testifying) asserted they were unaware of the company's position. There is no question, therefore, that many of the petitioners were being "defensive". It cannot be ignored, however, that from their perspective their jobs were on the line, for reasons not traceable to the posture of the company. While a lack of total candour may jeopardize any petition, the Board in this case does not find that the employees' defensiveness on this point raises inferences fatal to the issue of voluntariness. As the Board observed, once again in the *Blue Cross* case, *supra*, at paragraph 36:

36. ... the Board declines to draw a negative inference from the mere fact that the employer was clearly aware of the petition's existence, or that the employees would reasonably assume that such a development would be welcomed. As the Board commented in *Parker's Dye Works and Cleaners Limited*, *supra*, at paragraph 36:

... We have no misgiving in finding that [management] knew of the organizing by employees to terminate the respondent's bargaining rights. Nor do we hesitate to hold that the intervener would welcome the prospect of a successful termination application by the employees in the bargaining unit.

and beyond this in *Cooper-Weeks Limited*, [1967] OLRB Rep. Aug. 455, at paragraph 5:

It may be that, at the time they affixed their signatures to the petition, the employees were aware of, and took into account, the apparent facts of their employer's dislike for the officials of the respondent trade union. It does not follow from this, however, that the petition itself might not constitute a voluntary expression of the employees wishes.

34. There is in fact some further evidence from Antonio Amaral that the Board should comment upon. Mr. Amaral was asked by his counsel what the petition meant, and Mr. Amaral responded:

"To help the company. The company has been good to us for all these years."

Asked further about this by counsel for the union, Mr. Amaral referred, as others had, to the company's accommodation of vacation plans, and the steady work. He was then asked if Mr. Ribeiro told him that it would help the company if the employees signed this,

and Mr. Amaral answered: "Of course". Once again, the Board finds, Mr. Amaral was not afraid to state the obvious. Quite apart from the particular history of this case, employees generally perceive their employers as preferring to remain non-union, and it would be a rare employee who did not recognize that, in signing a petition against the union, he was acting in a way which would assist the company. The representation question itself is, rightly or wrongly, often cast as a test of loyalty between the employer and the trade union, and the focus of a campaign is often whether or not the employer by its track record has earned the employees' continued "loyalty". In this case Mr. Amaral obviously felt that the employer by its track record had done so. And, he affirmed in his evidence, he took his action without regard to whether the company would know that he had done so or not. There is nothing, therefore, in Mr. Amaral's evidence to suggest that he was doing anything other than, on rational grounds, exercising his own freedom of choice. On the contrary, his evidence, like so many of the others', reflected a basic satisfaction with conditions as they were, and a concern that the introduction of the union might change them. In this sense the way Mr. Amaral perceived his own interest and his reasons for supporting the company effectively merge.

35. None of this is to say that the same kind of openness and close co-operation with the company demonstrated on the first petition would not stand in the way of a finding of voluntariness if the issue had arisen in the context of a certification application. Indeed, as the Board noted *obiter* on even the limited evidence before it in the first grievance referral (Board File No. 1437-80-M, at paragraph 39):

39. ... The petition, which was filed before the Board, would not have persuaded the Board, had this been an application for certification, to lend any weight to the objections of the employees. Quite clearly, there was too much knowledge and participation and assistance by the supervisory staff of the employees for the Board to give any weight to such a document.

In a certification application, as noted above, those same employees (if the petition is material) have just signed union cards, and it is difficult to satisfy the Board that an apparent change of heart which takes place with the co-operation of management is voluntary.

36. But this is not an application for certification. It is not even a normal termination application. The claim of the union was as much a threat to the existing employees as it was to the employer, and everyone knew it. The Board does not in these circumstances find Mr. Ribeiro's freedom to visit the other job sites while off shift himself (on the first petition), nor the use of the regular carpenters' shop (on the second petition) after working hours, and after any members of management have gone home, cause it to fear that employees would have signed the petition because they perceived it as a company-sponsored document. Counsel for the employees submits that in the circumstances of this case:

"the Board would have seen a termination application if the employees had simply been left on their own in a 50-acre field: they *don't want the union!*"

On the basis of the evidence that the Board has heard, and the absence of any overtures made to the employees by the union, the Board, at this point at least, would have to agree.

37. The Board accordingly is satisfied that not less than 45 per cent of the 12 employees in the bargaining unit as of the date of the application have voluntarily signified in writing as of the "terminal date" that they no longer wish to be represented by the trade union. The 12 employees are, once again, those employees hired prior to the time that the Carpenters' Union put the company on notice of its view that the 1980 amendments to the Act caused the union's province-wide agreement to apply. These are the individuals the Board finds to be "employees" for the purposes of the Act and section 57(2), and to be employed "in the bargaining unit" at the material time. These are also the individuals entitled to a reasonable opportunity to make application for membership in the union, and the union must be mindful of the comments of the Board in paragraph 45 of *Culliton II* as to its responsibilities in that regard.

38. The Board accordingly directs that a representation vote be taken amongst the employees in the bargaining unit, which is described as:

All journeymen and apprentice carpenters, other than millwrights, engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

All employees in the bargaining unit as of the date hereof who make application to join the union as specified hereunder and who do not voluntarily terminate their employment or are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Inducon Development Corporation, Inducon Construction (Northern) Inc. and Inducon Design/Build Associates.

39. With respect to the grievance referral also before the Board, the parties have, as previously noted, agreed for that purpose that the provincial collective agreement is binding upon Inducon, and that Inducon has been employing on its own persons to perform carpentry work covered by that agreement. The Board accordingly finds that Inducon is employing carpenters in violation of the Carpenters' collective agreement, and directs, having regard to the dates of hire set out in paragraph 8 of this decision, and subject to any stay order now in effect:

- (a) that Inducon cease to employ on bargaining-unit work those carpenters whom it directly hired prior to July 18, 1980, who fail to make application to become members of the Union within ten clear days, Saturdays, Sundays and holidays excluded, from the date of issue of this decision or who fail to become members in the Union's normal way within the time limits reasonably determined by the Union's constitution; and
- (b) that Inducon forthwith cease to employ on bargaining-unit work those carpenters whom it directly hired subsequent to July 18, 1980.



40. For the purpose of clarity, the Board notes that Rafael Carvalho is already a member in good standing in the union, and nothing more need be done by him to preserve his employment status. The Board notes the further agreement of the parties that the Board remains seized of the grievance referral on all issues relating to damages.

41. The matter is referred to the Registrar.

**DECISION OF BOARD MEMBER B. K. LEE;**

1. I dissent.

2. I am not in disagreement with the facts as they appear in the majority decision.

3. Since the majority in paragraph 39 finds Inducon in violation of the Carpenters' collective agreement in their hiring practices, this accords support to the union's argument that the carpenters who brought the termination application lacked the status to do so.

4. Should benefits flowing from union membership and the provincial agreement provisions be awarded illegally-employed persons, and shortly thereafter a termination vote take place?

5. To allow the termination application to stand is, in my opinion, as much a violation of the intent and purpose of the Carpenters' collective agreement as was the hiring practices of Inducon.

6. I would dismiss the application for termination.

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**1577-82-R; 0066-83-U** Marvin MacKay on behalf of a group of employees, Applicant, v. United Steelworkers of America, and its Local 13571, Respondent, v. **Irwin Toy Limited**, Intervener; United Steelworkers of America, and its Local 13571, Complainant, v. Irwin Toy Limited, Respondent, v. Marvin MacKay on behalf of a group of employees, Intervener

Change in Working Conditions - Duty to Bargain in Good Faith - Interference in Trade Unions - Remedies - Termination - Unfair Labour Practice - Board finding contracting out breach of freeze provisions and prior settlement - Employees from non-union plant transferred to work side-by-side with unit employees - Paid significantly higher wages - Calculated to undermine union and unduly influence termination vote - Offer to union less than rate paid to non-union - Amounting to bad faith bargaining - Board directing tabling of non-discriminatory retroactive wage offer - New termination vote directed and deferred for three months

**BEFORE:** Michel G. Picher, Vice-Chairman, and Board Members C. A. Ballentine and J. A. Ronson.

**APPEARANCES:** *Howard Levitt, Marvin McKay and Israel Palter for the applicant; James Hayes, Bram Herlich and Alex Muselius for the respondent; A. D. G. Purdy for the intervener.*

**DECISION OF MICHEL G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER C. A. BALLENTINE; July 8, 1983**

1. The Board directs that the above termination application and complaint be and the same are hereby consolidated.
2. This is a complaint under section 89 of the *Labour Relations Act* which has been joined with a previously pending application for the termination of the complainant's bargaining rights. By a decision dated April 6, 1983 the Board ordered the taking of a representation vote in the application for termination. The vote was conducted on April 25, 1983. In light of certain allegations of unfair labour practices which the union maintains affected the ability of employees to vote freely, the Board sealed the ballot box and postponed the counting of the ballots pending a determination on the union's complaint.
3. The union submits that the respondent has violated sections 15, 64, 66, 67 and 79 of the *Labour Relations Act* by a course of conduct which it maintains amounts to open and systematic discrimination against the respondent's unionized employees.
4. The facts are not in substantial dispute. They may be summarized as follows:
  - (1) The respondent manufactures toys and other products, including gas barbecues, at its two plants in Metropolitan Toronto.
  - (2) The respondent's plant at 145 North Queen Street, Etobicoke (hereinafter "North Queen"), is unionized. Its second plant, located on Hannah Street (hereinafter "Hannah") in Toronto is not unionized.

(3) The union succeeded in negotiating a first collective agreement at North Queen only after a bitter strike of some six months' duration. The collective agreement, which became effective for one year on the fifth day of January, 1982, gave the unionized employees at North Queen a 13% wage increase. Shortly after its agreement with the union the respondent gave its non-unionized employees at the Hannah plant a 14% wage increase.

(4) The North Queen collective agreement introduced a sick pay plan for the benefit of employees effective May 1, 1982. Shortly after the collective agreement was concluded the respondent introduced what was described without contradiction as a "vastly superior" sick pay plan for the employees at its non-unionized Hannah plant. The more generous sick pay plan at Hannah, which was effective January 1, 1982, has some 14 exclusions from its coverage, the first of which listed is "employee covered by a Union Contract".

(5) During the early months of the collective agreement the respondent employed in excess of 100 "temporary" employees to do bargaining unit work. These employees, for whom union dues were not deducted, were provided by Unistaff, an employment agency owned and operated by Securicor Investigation and Security Ltd. The union filed a grievance to arbitration in protest. Prior to the hearing it obtained a settlement which put an end to the practice and provided compensation for unpaid union dues.

(6) During the early months of the collective agreement, the respondent changed its production practices to contract out substantial amounts of work which had been previously performed at North Queen. While the practice appears to have originated in the strike, once the collective agreement was signed the respondent continued the practice rather than recall unionized employees who had previously done the work at North Queen. The union filed an unfair labour practice complaint (Board File Number 0377-82-U) which resulted in a written settlement dated June 15, 1982. By the terms of settlement the respondent agreed to cease contracting out and to recall the employees in the bargaining unit to perform the work which had been jobbed out.

(7) On October 12, 1982, the union gave the company notice of its intention to bargain a renewal of the collective agreement. Bargaining subsequently took place between the parties on November 12, November 23, December 10, December 23 in 1982 as well as January 12 and April 15, 1983, the last negotiation being with the assistance of a conciliation officer.

(8) On November 18, 1982, an application for a declaration terminating the union's bargaining rights was filed by employee Marvin MacKay. The hearing of the termination application was concluded

on February 10, 1983. On April 6, 1983, the Board ordered the taking of a representation vote which was conducted on April 25, 1983. The ballots were sealed and not counted in light of the union's complaint.

(9) In the early part of 1983, the company had a substantial order of portable gas barbecue units to fill. In the past, the assembly and finishing of gas barbecues was performed at North Queen. At the bargaining session of January 12, 1983, the respondent proposed to the union that the barbecue assembly and finishing work be moved to the Hannah plant where a shortage of work threatened to cause a layoff of the non-unionized employees. The union refused to consent to the transfer out of the bargaining unit work, largely on the grounds that the North Queen plant had itself suffered a substantial reduction in work, going from 114 employees prior to the strike to some 54 employees at the time of the negotiations.

(10) Under the terms of the collective agreement the respondent had the right to transfer employees from another plant to the North Queen location. Between January 12th and the date of the representation vote the respondent transferred over 60 employees from Hannah to North Queen. There was no attempt to alter the voting constituency, as the transferred employees were not eligible to vote. The transferred employees were not, however, paid according to the collective agreement. While two employees previously transferred from Hannah to North Queen in October of 1982 had their wages adjusted to the lower rates in the collective agreement at North Queen, the same was not done for the large number of employees transferred to work on the gas barbecue production in the period leading up to the vote. The respondent continued to apply to the employees transferred from Hannah the same rates which they were paid at that location for work which they performed at North Queen. The transferred employees were all either assemblers, quality control inspectors or, in one case, a material handler. Without exception, the transferees from the Hannah plant were higher paid than the unionized employees in the same classifications with whom they worked side by side. While some of the unionized employees were paid at red circled rates in excess of the collective agreement rates, apparently by agreement with the union, the wages paid to the employees transferred from the Hannah plant were in every case greater than the red circled rates paid to North Queen employees in the same classifications.

(11) Notwithstanding its earlier agreement with the union to cease contracting out, in the first half of 1983 the respondent contracted portions of the fabrication and finishing of its portable gas barbecues to another company.

(12) During the same period and to the present, the bargaining position of the respondent has been an outstanding offer for a wage



increase of 8% to employees at North Queen. The employer's offer would give the unionized employees at North Queen a lower wage rate than is presently being paid to the non-union employees at the Hannah location. There is no evidence to suggest that there is any difference in the nature of the work or of the skill and ability required of employees at the two locations or that the seniority of employees at Hannah would justify the difference.

(13) It is undisputed that the respondent is in a healthy economic position. In a letter to all employees dated May 6, 1983, company president Arnold B. Irwin announced to all employees that 1982 saw the highest profits in the company's history. The employees in both plants were each given an extra five days' pay as a profit sharing bonus.

5. Counsel for the union submits that the foregoing facts disclose a pattern of deliberate discrimination calculated to convey the message that within the respondent's company unionized employees will be financially penalized while employees who do not choose union representation will be rewarded. He submits that the intended impact of intermingling the employees of the two plants during the weeks leading up to the representation vote was to convey that economic lesson to the employees who would be voting on union representation.

6. Counsel for the respondent submits that its actions were directed to preserving employment opportunities for its own personnel. He submits, moreover, that the differential in wages between the plants had existed for approximately a year before the intermingling began. Against that background, he maintains that the bargaining position of the respondent was not in violation of section 15 of the Act and that the transfer to North Queen of employees from Hannah at wages higher than those paid to the unionized employees was not a violation of the Act nor an interference with the ability of the employees to express their wishes in the termination vote.

7. Counsel for Mr. MacKay appeared at the hearing and made submissions with respect to his client's interest. He submits that the case does not disclose grounds for reconsidering the Board's decision to hold a representation vote in Mr. MacKay's termination application. He points to the fact that the actions complained of by the union principally occurred after the application for termination was filed, emphasizing that the impugned preferential treatment of employees from Hannah took place entirely after the circulation of Mr. MacKay's petition and, therefore, should not be allowed to prejudice his client's right to a representation vote based on a petition voluntarily signed by the employees. He submits that the ballots which were cast should be counted.

8. It is obviously not axiomatic that the unionized employees in one plant of an employer must necessarily receive the same treatment in respect of wages and benefits as comparable employees in another plant. Economic considerations may justify different wages and benefits in different work places. By the same token, it is plainly unlawful for an employer to punish a group of employees because they have chosen union representation or to reward another group because they have not. If it is unlawful for an employer to make such distinctions, it is equally in violation of the Act for it to bring

them forcibly to the attention of employees as a means of discouraging union support in the course of bargaining or in a representation vote. For those reasons the facts in the instant case raise issues fundamental to the recognition of the union as exclusive bargaining agent of the employees and going to the right of employees to vote freely, without promises, threats or undue influence, on the question of union representation.

9. The complaint is made both at the level of interference with the representation vote and in respect of the quality of bargaining. In this case the evidence establishes that a collective agreement was in place at North Queen making binding provision for wage rates at that location. To produce its gas barbecues the respondent had the option of hiring new employees at North Queen or offering Hannah employees, who would otherwise be laid off the opportunity of some work at the lower North Queen rates. It chose neither. Rather, with the application for the termination of the union pending it transferred substantial members of employees from Hannah to North Queen on a rotating basis, without any adjustment in their wages to the lower rates in the collective agreement. In the result employees in like classifications worked together, with higher wages being paid in each case to the transferees from the non-union plant. At the same time, the company's outstanding monetary offer, to the union, apparently made in a time of unprecedented profits, was pitched at a level that would have left the unionized North Queen employees short of what is now being paid to the unorganized employees at Hannah.

10. The only evidence before the Board on the comparability of the work forces and the work in both plants is that of union representative Alex Muselius. While he has not visited the Hannah plant he has some general familiarity with the respondent's operations through extended contact with it since the certification of the North Queen plant. His evidence is that the plants are comparable in their product lines and in the skill and ability of their respective work forces. The respondent called no evidence to explain the historical basis, if any exists, for the wage and benefits differential between its two plants. Nor was any witness called to explain the rationale for its transfer of Hannah employees to North Queen in disregard of the collective agreement wage rates or to explain the rationale for the company's outstanding offer in the next agreement of lower wages for unionized employees than are now being paid to its non-union employees at Hannah.

11. The different treatment of employees may be explained on the basis of legitimate economic reasons. Where, however, no such reasons are apparent and, as in the instant case, no evidence is forthcoming to explain the preferential treatment of one group of employees over another, the Board must look with great care to the whole of the evidence. That is particularly true in these circumstances where, given the bargaining history, the parties are in a situation for all practical purposes likened to a first agreement negotiation. Absent any explanation, parties may be presumed to intend the consequences of their actions. While in this case the burden of proof generally referred to as the "legal burden", is at all times on the union, the adducing in evidence of facts which would support adverse inferences against the employer shifts the onus to the employer to come forward with some explanation for its actions.

12. There is much in the evidence before the Board to substantiate the submission of the union that the respondent has, from the time of the union's certification and its strike, deliberately created the conditions for an early termination of the union's

bargaining rights. The events immediately following the strike point in that direction. They include the contracting out of bargaining unit work and the employment at North Queen in substantial numbers of temporary non-union employees supplied by a security company. At or about the same time, the company instituted the unexplained preferential wage treatment of all employees at the non-unionized Hannah plant, along with better sick benefits. There is no evidence that the greater increase at Hannah was implemented to bring the employees there to an equal footing with the North Queen employees. On the evidence of the union, absent any explanation by the employer, we must conclude that previously the employees were on the same wage scale in both plants and that the 14% increase raised the entire scale of wages at Hannah above the union scale at North Queen. Later, at a time when it declared a profit-sharing dividend for all employees, the company's position with its unionized workers was that it could not or would not pay them at the same levels it was prepared to pay comparable employees in its unorganized plant.

13. While these facts standing alone might cause the Board substantial concern, they take on added significance in the context of the Board's representation vote. The evidence establishes that in October of 1982 two employees were transferred from the Hannah plant to the North Queen facility. At that time their wages were adjusted to come within the terms of the collective agreement in force. Several months later, when the application for the termination of the union was pending, the respondent implemented the transfer of over sixty employees from the Hannah plant on a short-term basis without any adjustment in their wages. In all cases the Hannah employees were paid more than employees in the same classifications at North Queen and in all but two cases their present wages exceed the wages which the unionized employees are currently being offered in bargaining by their employer. As the vote approached the two groups of employees worked side by side.

14. The transfer and intermingling of the employees cannot be viewed in isolation. Given the background of the respondent's prior attempts to contract out bargaining unit work and to channel the work of the unionized plant to the employees of a security firm, they can be understood as one further step in a consistent pattern of conduct aimed at undermining the bargaining rights of the trade union.

15. It is contrary to the Act to either punish or reward employees because of their preference for union representation. (See *Empco-Fab Ltd.*, [1982] OLRB Rep. Aug. 1162; *Peabody Coal Company*, (1982) 111 LRRM 1480; *NLRB v. Rubatex Corp.*, (1979) 601 F 2d 147, 101 LRRM 2660 (U.S.C.A. 4th Cir.)) It is also a violation of the duty to bargain in good faith for an employer to advance, without any economic justification, an offer to its unionized employees which is intended as a message that they will suffer economically as long as they choose to be represented by a union or exercise the rights of organized employees. For example, the Canada Labour Relations Board has recently found that an employer violated the Canada Labour Code by bargaining to impose collective agreement terms which it found were intended to reward employees who did not participate in a lawful strike and punish employees who did. (*Eastern Provincial Airways Ltd.*, decision dated May 27, 1983, as yet unreported).

16. The wholesale transfer of non-union employees to the North Queen location where they worked side by side with unionized employees who were paid lower rates put the union in the worst possible position during the period of the pending application for



the termination of its bargaining rights. The stark contrast in the treatment of the two groups of employees would not be wasted on those who were to vote on union representation. The differential in wages paid, coupled with the prospect of a continued disadvantage to unionized employees in light of the respondent's outstanding wage offer, was tantamount to a statement from their employer that they would be financially rewarded if they voted to reject the union.

17. We see nothing in the collective agreement to authorize the transfer of employees from the plants at rates other than those in the collective agreement. Article 21.03 of the collective agreement provides:

21.03 Temporary Transfers

(a) An employee who is temporarily transferred to meet the Company's convenience *to another job* for which the regular rate is less than that which the employee is receiving, he/she shall retain his/her former rate, and if such transfer is to a job with a higher rate, the employee shall receive the higher rate paid for such job.

(b) An employee who is temporarily transferred from his/her regular job due to lack of work shall be paid the rate of pay for the job to which he/she is transferred provided the time spent on the new job is one hour or more.

(emphasis added)

That provision, frequently found in collective agreements, plainly refers to the transfer of employees between jobs within the bargaining unit. It cannot, in our view, be advanced as contractual authority for the employer to freely disregard collective agreement wage rates when it transfers higher paid employees from another plant. In our view it would require clear and unequivocal language to support that conclusion.

18. Part of the evidence adduced by the union was directed to establishing what it maintained was a violation of its settlement of June 15, 1982 in relation to contracting out work at the North Queen plant. It is not disputed that the respondent has contracted out substantial portions of the assembly and finishing work on the gas barbecue product lines. Its earlier settlement with the union contains, in part, the following express provisions:

This settlement is made pursuant to Sections 89 (7) of the *Labour Relations Act* and the terms are set out as follows.

1. All the work performed at the North Queen location of the Company within one year prior to the strike of the United Steelworkers of America commencing June 17, 1981 will forthwith be performed at the said North Queen Street location and will not be performed at any other location of the Company, nor by an outside contractor, agency or person.



2. Without limiting the generality of the foregoing the work referred to in point 1 includes the following:

• • •

(ii) All work relating to the “Bar-B-Q” product lines, except bag assembly work.

19. The respondent’s practice of contracting out appears to be in clear violation of the terms of settlement reached with the union. Counsel for the respondent submits that the settlement was made for the limited purpose of securing the reinstatement or recall of employees who at the time were still not returned to work after the strike. While that may have been the motive for the complaint, and while the settlement provides for the reinstatement of bargaining unit employees, the obligations appearing on the face of the settlement are not qualified. There is nothing in the language of the settlement to limit its application or enforcement to a one-time-only basis. Moreover, the fact, admitted by the respondent, that on January 12, 1983 it approached the union for its approval to move the barbecue assembly work out of North Queen suggests that it felt bound by the settlement at that time, the terms of which precluded moving work to “any other location of the company”. At a minimum, the settlement terms would appear to be enforceable for the life of the collective agreement, a contract whose terms are still subject to the statutory freeze. In these circumstances, the Board concludes that there has been a violation of the settlement and, by extension, a violation of the freeze provisions under section 79 of the Act.

20. The motive for an unfair labour practice is seldom, if ever, admitted. More often that not it must be inferred from the preponderance of the evidence. In this case the conduct of the respondent in a sustained pattern compellingly suggests anti-union motivation as the most probable explanation for its actions. The significant events include the erosion of the bargaining unit by the hiring on to the shop floor of a substantial number of employees provided by a security firm, the undermining of the respondent’s bargaining rights by contracting out both immediately after the strike and again prior to the vote, the payment of higher percentage increases and more generous sick pay benefits to non-unionized employees at the Hannah plant, the intermingling of the two groups of employees without regard to the collective agreement wage rates prior to the vote and the tabling of the company’s present offer which would continue, if not widen, the existing gap between union and non-union employees.

21. In light of these events the words spoken by Mr. Lowe, manager of the North Queen plant, to a group of employees opposed to the union shortly after the strike ended take on greater significance. In the hearing on the voluntariness of the termination petition the Board heard evidence that Mr. Lowe told the employees who had opposed the union that “hopefully somewhere down the line I’ll be able to look after you”. In light of the cross-examination in that hearing of employee Anthony Branco, who was found to have made a prior inconsistent statement, we are satisfied that Mr. Lowe also told his anti-union employees that there would be “a pot of gold at the end of the rainbow”. The evidence now before us is consistent with a sustained intention to bring that promise to fruition. We are satisfied that the respondent sought deliberately to undermine the

union's bargaining rights both by eroding the size of its bargaining unit and by conveying to the employees in the bargaining unit that better wages and benefits would be realized only if they rejected the union. Absent any explanation from the respondent we must conclude that the employer's actions in transferring the Hannah employees were calculated to bring undue influence to bear on the choice of the employees on the issue of the termination of the union's bargaining rights.

22. On the whole of the evidence the Board also finds that the respondent has bargained in bad faith. It has through its outstanding wage offer, held out the implicit promise of continued preferential treatment to its non-unionized employees and the economic punishment of those who would choose union representation. This it has done as a deliberate means of bringing undue influence and the implicit promise of reward to bear on the employees participating in the vote on the termination of the union. For the foregoing reasons the Board concludes that the respondent has violated sections 15, 64, 66, 67 and 79 of the Act.

23. We turn to consider the remedy. The Board accepts the submission of counsel for the union that its remedy should be directed, insofar as possible, to restoring the union to a situation in which the harm suffered by the unionized employees and the union is undone. It appears from the agreed facts that the union was aware of the better wages and benefits being paid at the Hannah plant since early 1982. That situation continued for over a year without complaint from the union, and it is only when the employees were intermingled in disregard of the terms of the collective agreement that this complaint materialized. The real thrust of the union's complaint is the mixing of the two groups of employees in the freeze period prior to the representation vote, coupled with the apparently punitive offer of the respondent in bargaining. Those are the actions of the employer which have undermined its ability to exercise and retain its bargaining rights.

24. It appears to the Board that these effects of the respondent's unfair labour practices can be remedied by a number of affirmative orders directed to the union's legitimate collective bargaining concerns. It is appropriate to make a bargaining order predicated on the normal expectation that any new wage provisions will be retroactive to the expiry date of the first collective agreement. This can be achieved by ordering the tabling forthwith of a non-discriminatory wage offer with retroactivity to January 5, 1983. That would restore the unionized employees to the knowledge that any imbalance in their wage treatment over the retroactivity period, which is the same period the Hannah employees were transferred to North Queen, will be remedied. They may then vote on union representation knowing that the discriminatory wage treatment they received over that period would be undone by the terms of the new collective agreement. We are therefore satisfied that the harm to the union can be redressed by an order that will put an end to the unfair intermingling of employees in the future coupled with an order requiring the respondent to table a retroactive wage offer that is not discriminatory towards its unionized employees.

25. We are further of the view that in light of the substantial unfair labour practices of the company, the representation vote held on April 25th cannot be relied on as an expression of the free wishes of the employees in the bargaining unit. The Board accepts the submission of counsel for Mr. MacKay that the rights of those employees who voluntarily petitioned to terminate the union's bargaining rights should not be unduly

prejudiced by the employer's violations of the Act. It appears to the Board, however, that the interests of the termination applicants and those of the union can be balanced. The taking of a second representation vote, deferred to a date which will allow a reasonable period of time for the Board's remedial order to undo the effects of the employer's unfair labour practices will achieve that end. We are satisfied that the taking of a second representation vote of the same employees who were entitled to vote previously three months from the date of this order will reasonably balance the interests of the termination applicants and the union.

26. The Board therefore orders as follows:

1. The respondent shall forthwith cease and desist from the contracting out of bargaining unit work contrary to its settlement of June 15, 1982;
2. The respondent shall cease and desist forthwith from the transfer of employees to its North Queen plant from its Hannah plant unless employees from both locations in the same classifications are paid the same rates or such other rates as may be consented to by the Union.
3. The respondent shall table forthwith a wage offer the terms of which shall not be discriminatory towards unionized employees and the retroactivity provisions of which shall compensate the employees at North Queen for discriminatory wage differentials in effect in the North Queen plant after January 4, 1983.
4. The respondent shall cease and desist from bargaining in bad faith and shall refrain from making any other offer intended to discriminate against its unionized employees.
5. The respondent shall post forthwith copies of the attached notice marked "Appendix", duly signed by its appropriate officer in conspicuous places at its places of business or work centres where bargaining unit employees are based, including all places where notices to employees are customarily posted, and keep these notices posted for 60 consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material.

27. The Registrar is instructed to destroy the ballots cast within thirty days of this decision and to re-conduct the representation vote herein on the first convenient date after the expiry of three months from the date of this decision.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. By majority decision dated April 6, 1983 the Board ordered a representation vote of all employees of the respondent employer employed at 165 North Queen Street, Etobicoke ("North Queen Plant"). That order was a result of an application for

termination under section 57 of the *Labour Relations Act* which was filed on November 18, 1982, and in which hearings were concluded on February 10, 1983. Following that decision the applicant union began the present proceedings on April 12, 1983. The allegations made in these proceedings were not raised in the previous application for termination.

2. The evidence that we heard from the union was not long or complicated. Both the union and the employer are in substantial agreement on the material facts. Where they disagree is on the inferences that we, as an administrative tribunal, should draw from these facts. This is not a situation where section 89(5) of the *Labour Relations Act* applies. There is no onus on the employer to disprove the assumption that its conduct is unlawful. The onus is on the union to prove its allegations on the balance of probabilities. It is not for this Board to make assumptions which the employer must disprove.

3. The union sought to show a pattern of unlawful anti-union conduct by the employer through a series of events stretching back almost to January, 1982, the month in which a first collective agreement was signed following a six month strike. The culminating incident to the pattern was the use by the employer of employees from its non-union operations on Hannah Street in Toronto (the "Hannah Plant") to assemble outdoor gas barbecues at the North Queen Plant. On January 12, 1983 (while hearings were still proceeding before the Board on the application for termination) the employer advised the union that it had substantial orders for barbecue units for the summer season and wished to assemble them at the Hannah Plant. There was insufficient work at the Hannah Plant and the alternative would be to lay-off employees at that location. The union took the position that the work had to be performed at the North Queen Plant. The employer took the position that it could do the work at the Hannah Plant if it wished.

4. Alex Muselius, a staff representative for the union, gave evidence. He testified that:

- (a) he knew employees from the Hannah Plant were working at the North Queen Plant in January, 1983;
- (b) at a meeting on January 12, 1983 the wage rates of the Hannah Plant employees were discussed between the employer and the union.
- (c) temporary transfers of employees between the two plants was specifically allowed by the collective agreement and such employees transferred from the Hannah Plant to the North Queen Plant *would maintain their higher rate.*
- (d) many employees at the Hannah Plant had wage rates in excess of what was in the collective agreement. In the collective agreement those employees were "red-circled" i.e., they received the higher of the negotiated rates *or* their present rate plus 13%.
- (e) shortly after the signing of the collective agreement the employees at the Hannah Plant received a 14% wage increase and a



superior sick pay plan. When asked if the Hannah Plant employees did the same work as the North Queen employees, Mr. Muselius replied that it varies from the work done at North Queen — the products are toys and small items and *he did not have first hand knowledge*;

- (f) the parties are discussing wages, sick pay, maternity leave, and a dental and hospital plan in the current negotiations for a new collective agreement; and
- (g) there is no part-time unit at the North Queen Plant and part time workers are excluded from the bargaining unit; (Mr. Hayes then advised that the union's position was that part-time workers were covered by the scope clause in the collective agreement.)

5. As part of their finding of a pattern of illegal activity my colleagues rely on the facts that:

- (a) the employer *may* have hired temporary employees from an agency in violation of the collective agreement; and
- (b) the employer *may* have contracted out work in violation of settlement dated June 15, 1982 (Exhibit 2). I use the word "may" in both instances because when the pattern is examined it is readily apparent that there are *bona fide* arguments on both sides as to whether or not the hiring of temporary employees or contracting out is allowed. These are issues quite separate from the necessary illegal intent required by the *Labour Relations Act*.

6. The union filed a grievance over union dues that had not been remitted for the temporary employees. That grievance was settled. The only facts from which any inference can be drawn are that temporary employees were used as required by the employer. The need for, and the use of such temporary employees obviously continues, as is clear from the use of the Hannah Plant employees to temporarily assemble the barbecue units. We heard evidence that the Hannah Plant employees were moved in and out of the North Queen Plant on an "as needed" basis and the union had great difficulty in keeping track of how long they stayed at the North Queen Plant. Union dues were remitted for the Hannah Plant employees working at the North Queen Plant.

7. With respect to contracting out there was a polar split between the parties as to the interpretation of the June 15, 1982 memorandum of settlement. Mr. Muselius testified that the union felt the agreement was in full force and the employer's position was that it no longer applied. My colleagues take an arbitrable difference of long standing and turn it into an unfair labour practice. On examination of Exhibit 2, I find there is indeed a valid argument that the settlement was intended only to apply with respect to those employees who were on lay-off in June, 1982. There are no employees on lay-off with recall rights at the North Queen Plant now. Rather, at the hearing, the union argued that new "permanent" employees should be hired at North Queen to do the work that was contracted out.

8. Exhibit 5 is a list of 101 bargaining unit employees at the North Queen Plant during the period January 4, 1983 to February 19, 1983, (i.e. prior to the Board decision ordering a vote). It contains the job classification and wage rate for each employee. It contains the seniority date for 52 employees. With respect of Exhibit 5, Mr. Muselius said that:

- (a) employees numbered 48 to 53 were newly hired persons on probation. They received the contract rate and had no seniority date because they were on probation;
- (b) if a Hannah Plant employee was transferred to a permanent position at the North Queen Plant, he or she would get their full earned company-wide seniority after the probationary period was over. Employees numbered 21 and 43 were transferred from the Hannah Plant to the North Queen Plant in October, 1982. They kept their company-wide seniority, but their wages were reduced to the base rate for their classification under the collective agreement;
- (c) the collective agreement allowed temporary transfers from the Hannah Plant to the North Queen Plant at the employees' normal wage rate. Employees numbered 55 to 97 were Hannah Plant employees transferred to the North Queen Plant. They were paid their Hannah Plant rate and have no seniority shown vis-a-vis the North Queen Plant employees.

9. My colleagues use Exhibit 5 to infer that the employer is guilty of discriminatory conduct. By my count there are 54 permanent employees at the North Queen Plant shown on that exhibit:—there are 29 different wage rates amongst them and 21 of them are earning more than what their wage rate should be pursuant to the collective agreement, i.e. there are 21 “red-circled” employees out of 54. If there is anything that can be inferred it is that the employer treated employees numbered 21 and 43 as permanent employees at the North Queen Plant and employees numbered 55 to 97 as temporary employees at North Queen. Employees numbered 21 and 43 received rates as new employees at North Queen. Employees numbered 55 to 97 were treated as if they were still Hannah Plant employees. If they had not been so treated the employer could be accused of “padding the list” in preparation for a possible decertification vote.

10. Exhibits 5 and 7 indicate that employees from the Hannah Plant in the following wage classifications were used at the North Queen Plant:

No. of employees:

Assembler: 58

Material Handler: 1

Quality Control Inspector: 4

Their wage rates were as follows:

Assembler: 27 different hourly wage rates ranging from a low of \$4.22 to a high of \$5.99

Material handler: \$6.50/hr.;

Quality control inspector: \$4.99/hr.; \$5.12/hr.; \$5.40/hr.; \$5.64/hr.

11. Of the North Queen Plant employees on Exhibit 5 there are four assemblers:

<u>Number</u>	<u>Wage Rate/hr.</u>
14	\$3.70
21	3.70
42	3.96
43	3.70

(Number 21 and number 43 are employees permanently transferred from the Hannah Plant in 1982.)

There are no North Queen material handlers on Exhibit 5, but there is one quality control inspector (number 15) and he is paid \$4.90 per hour.

12. To reiterate, we do not know what kind of work the assemblers do at the Hannah Plant nor do we know what the wage differential was between the two groups of employees before their most recent increases. What we do have is the answer that Mr. Muselius gave in answer to a question by the Vice-Chairman: he was asked if there was wage parity in the two plants and he answered *that Hannah Plant employees were paid more both before and after the collective agreement, but it was very hard to sort out because there were a lot of rates.*

13. Counsel for the employer submitted that the employer was in a "no-win" situation when it obtained the orders for a large number of barbecues. It felt that it could assemble the units at the Hannah Plant but it did not wish to influence the possible vote by the employer at the North Queen Plant. When the union refused to agree to the work being done at the Hannah Plant the employer decided to use Hannah Plant employees as it was entitled under the collective agreement. This would also keep Hannah Plant employees from being laid off. The Hannah Plant employees were treated as temporary and were paid their normal wage rate. If it had cut their wage rates and told the employees that it was what the union bargained for, "the employer would have been before this Board so fast it wouldn't be funny". Wages above the base rate at the North Queen Plant are the norm rather than the exception because of "red-circling". The union knew of the wage rates paid to the temporary employees in January, 1983 but did not object until March. And before the Board the union now argues that the rates should not be lowered, but rather the ballot box should be sealed. In point of fact there are only three assemblers at the North Queen Plant who could possibly be influenced in any way by the wages paid to the employees from the Hannah Plant, two of whom had already taken a pay cut when they moved from Hannah to North Queen. If the employer wanted

to “diddle” the North Queen Plant it could move Hannah Plant employees in on a permanent basis, keep them working for three months until they had company-wide seniority, and when the barbecue work was over they would be able to bump out the union members at North Queen. While the decertification proceedings were still taking place, the employer was “damned if it does and damned if it doesn’t”, save to stop building gas barbecues and “we certainly have business reasons for not doing that.”

14. A consideration of the various solutions open to the employer is helpful:

- (a) Hire new employees or “strangers” at the North Queen Plant so as not to have an adverse effect on the union. This would result in the lay-off of employees at the Hannah Plant. Is this how we want an employer to treat its employees? Is this discrimination against employees because they are not represented by a union; or
- (b) Move the Hannah Plant employees to the North Queen Plant as permanent employees and pay them the collective agreement rates. They would be able to vote if this Board ordered a decertification vote. And, after 3 months they would have company-wide seniority at the North Queen Plant. They would be able to bump out those “union employees” at the plant with less seniority should a lay-off occur, i.e. the work on the gas barbecues is finished. The unfair labour practice implications are self-evident; or
- (c) Move the Hannah Plant employees to the North Queen Plant as temporary employees but pay them the collective agreement rates. Heaven help the employer if it does this and the union is attempting to organize the Hannah Plant. And, not surprisingly, the union did not request this relief from the Board; or
- (d) Move the Hannah Plant employees to the North Queen Plant as temporary employees at their normal wage rates. This has an effect on the union presence at the North Queen Plant, but since only two employees (one assembler and one quality control inspector) might be influenced by the differences in wage rates, the effect is minimal; or
- (e) Manufacture the units at the Hannah Plant. This would have the maximum adverse effect on any possible vote; or
- (f) Don’t manufacture the barbecue units!

15. My colleagues draw adverse inferences from the bare facts that the employees at the North Queen Plant received a 14% wage increase and a better sick pay plan. The problem with that approach is that it is predicated on the assumption that a unionized plant always leads—it is the one that always comes out on top for the benefit of its members. If a non-union plant has better working conditions than that is discrimination *per se*. Quite apart from the wisdom of this Board making and accepting such an



assumption, I can only wonder why the union took over a year to complain to us about this treatment.

16. It may be said by some that when my colleagues draw adverse influences from a settlement and a long-standing arbitrable difference, they are applying the policy of the Board of making adverse inferences whenever there is evidence of an action having an adverse effect on a trade union. If that is so, then an employer is faced with a reverse-onus situation whenever it comes before this Board to answer unfair labour practice charges. A trade union does not even have to prove a *prima facie* case, it need simply show effect and it is then up to the employer to disprove wrongful intent. Without legislative sanction I find such trial by innuendo to be repugnant. On the same basis, by merely writing this decision I can find myself accused of being anti-union and then having to prove the negative.

17. And if this Board is disposed to draw adverse inferences from evidence of adverse effect it becomes next to impossible for an employer, (which has exercised its rights and played a good game of hardball bargaining), to convince the Board that it has no anti-union motives within the Board's definition of what is unfair. It seems to me that the Board has to accept the adversary system of labour relations or define its concept of labour relations to the community of employers. We use an adversarial test in deciding whether or not to certify a union and then seem to forget that what follows is a struggle between relative bargaining strengths. I don't think the preamble to the *Labour Relations Act* was intended to allow us to ignore this fact.

18. As part of their remedy my colleagues order the employer to table an offer that is not discriminatory. Based on the evidence we heard about the myriad number of rates and "red-circling" I wonder what offer can be made that is not discriminatory according to their reasoning.

19. When all is taken into account and considered, it seems to me that my colleagues are confusing the effect of a business decision with unlawful intent. The union, has failed to prove the necessary intent to commit the unlawful labour practices alleged. And what it has great difficulty in obtaining at the bargaining table, it now seeks to obtain by order of this Board. I would dismiss this application by the union, and order the vote be counted.

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**0092-83-R** United Brotherhood of Carpenters and Joiners of America, Local Union 93, Applicant, v. **J. A. Wilson Display Ltd.**, Respondent

**Certification - Construction Industry - Practice and Procedure - Respondent held not employer operating business in construction industry - Board treating certification application as filed under general provisions - Work not covered by subsisting collective agreement of other union - Application not barred**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members C. A. Ballentine and I. M. Stamp.

**APPEARANCES:** *B. W. Adams and W. Chretien for the applicant; T. Churchmuch, D. Wilson John Szabo and George Smirnov for the respondent; James D'Onofrio for the intervener.*

**DECISION OF THE BOARD;** July 6, 1983

1. This is an application for certification made under the construction industry provisions of the Act in which the applicant is seeking to represent all carpenters and carpenters' apprentices employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices employed by the respondent in all other sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell (the Board's geographic area #15).

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. The reply to the application filed by the respondent opposes the application on the grounds that the respondent does not operate a business in the construction industry and therefore is not an employer within the meaning of clause c of section 117 of the Act. The respondent pursued that defence at the hearing held into this application and the Board heard evidence from witnesses for the both parties about the nature of the work being performed by the persons whom the applicant was seeking to represent at the time material to this application. Having regard for all of the evidence before the Board and the submissions thereon of both parties, the Board finds that the respondent was not an employer operating a business in the construction industry within the meaning of clause c of section 117 of the Act on the date of application. Therefore the Board further finds that this is not an application for certification within the meaning of section 119 of the Act.

4. In the event that the Board might come to that conclusion, counsel for the applicant had pleaded in the alternative that the Board should treat the application as one made under the general provisions of the Act instead of under its construction industry provisions. It has been the Board's general practice in circumstances where the construction industry provisions are not applicable and where the applicant would have been entitled to bring its application under the general provisions of the Act, to treat the application as though it had been made under the general provisions. Therefore, the Board proposes to treat this application as though it had been made under the Act's

general provisions. In this respect, see the Board's unreported decision in *A.N. Shaw Restoration Ltd.*, Board File No. 0014-80-R, which issued October 30, 1980.

5. There is a subsisting collective agreement between the respondent and the International Union of Electrical, Radio and Machine Workers and its Local 565. Clause 2.01 of the agreement grants recognition to Local 565 as the exclusive bargaining agent for all employees of the respondent *at its plant or plants* in Ontario, excluding foremen, persons above the rank of foreman and office staff. The respondent claims that, on those rare occasions when it assembles and places movable merchandise display units in the field for a customer, it does so under this collective agreement. The respondent contends, therefore, that the collective agreement is a bar to this application. In the instances where the respondent does these installations, it uses its plant employees if the work is reasonably accessible to its plant in Metropolitan Toronto. If it is not reasonably accessible to the plant, the respondent hires carpenters in the locality of the work through the United Brotherhood. That is what was done in the instant case because the work was located in the City of Ottawa, although there was the additional reason of the client having specified that union labour be used. The respondent claims further that employees hired in the field are employees hired within the scope of the collective agreement with Local 565. The evidence before the Board belies that claim. The wording of clause 2.01 referred to above does not readily accommodate employees hired to work outside of the plant to install the respondent's products. Moreover, there are no classifications in the wage schedule of the agreement which would reasonably include the work performed with respect to this application and the employees who were hired to perform this work were paid wages and benefits not determined pursuant to the collective agreement with Local 565. There is no evidence before the Board of any other specific instance where employees were hired in the field to install the respondent's products for one of its customers. The employer has no plant in the City of Ottawa where the work was performed with respect to this application. In these circumstances, the Board finds that the collective agreement does not cover the work in question and is not a bar to this application.

6. The Board further finds that all employees of the respondent employed in the City of Ottawa, save and except foremen, persons above the rank of foreman, office and sales staff, constitute a unit of employees appropriate for collective bargaining.

7. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 25, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. A certificate will issue to the applicant.

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**0115-83-R** International Association of Machinists and Aerospace Workers, Applicant, v. **Jaeger Machine Company of Canada Ltd.**, Respondent, v. Jaeger Employees' Union, Predecessor Trade Union, v. D. Moyes, Objector

Successor Status - Constitutional procedures followed for predecessor union to merge with successor union - Employer requesting Board to conduct vote to ascertain wishes of membership - Board finding no evidence of misunderstanding declaring applicant successor trade union

**BEFORE:** Corinne F. Murray, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

**APPEARANCES:** *William K. Fraser for the applicant; T. A. Crossman, R. W. McBain and George E. Clarke for the respondent; Jim Donnelly and Keith Pogue for the predecessor trade union; Douglas Moyes on his own behalf.*

### **DECISION OF THE BOARD;** July 8, 1983

1. This is an application pursuant to section 62 of the *Labour Relations Act* in which the applicant claims it has acquired the rights, privileges and duties of the Jaeger Employees' Union ("JEU"), the alleged predecessor trade union, and seeks a declaration to this effect.

2. The essential facts relevant to the Board's determination in this matter were undisputed. Jim Donnelly, President of the JEU, testified as to the predecessor trade union and the steps followed to have the applicant become its successor. The JEU has been recognized by the respondent as the bargaining agent for the employees in the following unit:

All hourly paid employees of the Company save and except inspection staff, foremen, persons above the rank of foreman, plant engineers, office staff, watchman, janitors, guards and students"

since approximately 1967. Mr. Donnelly, who was an official of the JEU at the time, claimed it was certified in approximately 1968 or 1969 after the first collective agreement had been concluded (and recognition granted). No certificate was produced at the hearing and the respondent did not give any evidence or make any argument disputing this history. The JEU and the respondent are currently bound by a collective agreement, the term of which is from January 12, 1983 until January 11, 1984. There have been a total of seven or eight collective agreements between the JEU and the respondent.

3. At a JEU meeting on January 16, 1983, a motion was made "to look into getting an International Union". This motion was carried. As a result of this, Mr. Donnelly made his investigation and reported back to the membership at a February 19th meeting. He had found out from an official of the applicant what steps the JEU had to follow to obtain the applicant as the successor union. The first such step was taken at the February 19th meeting, i.e., the tabling of a motion amending Article 2, paragraph 4 of the Constitution of the JEU to insert the following provision regarding mergers, amalgamations or



affiliations with another union. The full text of the motion as recorded in the minutes is as follows:

- It is hereby moved that Article 2 (object) of the Constitution Jaeger Employee's Union be amended by adding a new paragraph (4) which reads:

The Union may, at a general meeting of the membership, on a vote of Majority of the members of the Union in attendance, merge, amalgamate or affiliate with any other trade Union or Council of trade unions and may authorize its Officers to take all necessary steps to effect such merge, amalgamation, or affiliation.

This motion was carried by those at the meeting but a further step was necessary in view of Article 7 of the JEU Constitution. Article 7 states:

#### 7. Amendment to Constitution

Amendments to this constitution may be made at any regular or special meeting provided notice of intention to act so is given at the same time the notice to act is given at the same time the notice of the meeting is given, at which the amendment is to be voted upon.

Pursuant to the procedures set out in Article 7, a written notice of a meeting to be held on March 6, 1983 was posted at the work place (the JEU's normal procedure for notifying its members) which notice included the full text of the motion proposed at the February 19, 1983 meeting.

4. At the March 6th meeting a secret vote was held regarding the motion to amend the constitution. The result of the vote was unanimous acceptance. At the same meeting the next step toward merger was taken. A motion was proposed that the JEU merge with the applicant. The form of the motion was as follows:

It is hereby moved that the Jaeger Employees Union merge with the International Association of Machinist and that the Officers of the Jaeger Employees Union are authorized to take all necessary steps to effect such merger.

A written notice of a meeting to be held on March 20, 1983 to vote upon such motion, (the full text of which was on the notice) was hand-delivered to all the members of the JEU by Keith Pogue, Treasurer of the JEU. Each member (except one) signed their name in the presence of Mr. Pogue to indicate acknowledgement of having been notified by delivery of the written notice. One employee refused to accept the notice and refused to sign.

5. At the March 20th meeting the members attending voted by secret ballot on the proposed motion. All except one voted in favour of it. Following this Mr. Donnelly telephoned Don Bate, Business Representative for District 184 of the applicant, and

advised him that the motion had passed. Mr. Donnelly asked Mr. Bate to proceed with the steps he had to take to accomplish the merger.

6. As a result, William K. Fraser, International Representative, wrote to Mike Rygus, General Vice-President in Canada for the applicant, requesting permission to proceed with the merger as a result of the motion having been passed by the membership at its March 20th meeting. By letter dated April 8, 1983, Mr. Rygus approved the merger and authorized Mr. Fraser to proceed with its implementation in accordance with the *Labour Relations Act*. A copy of a Resolution of the Executive Council of the applicant dated November 11, 1976, indicates that the General Vice-President in Canada is authorized to give such approval. The instant application was mailed on April 15, 1983.

7. Douglas Moyes, an employee of the respondent and member of the JEU throughout the period between January 16, 1983 and April 15, 1983, appeared before us and gave evidence. His position was that the merger should not be permitted by this Board. He indicated that he had no allegations that what either Mr. Donnelly or Mr. Pogue said was untrue. He confirmed that what Mr. Donnelly had said about the meetings was "basically" true. He had attended all the meetings mentioned above except the one on February 19th. He had voted in favour of the motion to amend the Constitution passed at the March 6th meeting and had voted against the motion to merge with the applicant at the March 20th meeting. His complaint was that there had been a misunderstanding on his part as to the effect of the March 6th motion. He thought that it was to allow Mr. Donnelly to look further into affiliation and he voted for the motion on that understanding. He believed this notwithstanding the fact that a second motion was tabled at the same meeting where a concrete proposal for the merger with the applicant was made. Mr. Moyes said he decided not to argue the second motion at that stage, preferring to wait for the vote on it. He had been at the January 16th meeting where the original motion authorizing Mr. Donnelly to "look into" the possibility of affiliation was carried. He claims after that he had been expecting that a representative from the proposed union would speak to the members at some point. He was absent from the February 16, 1983 meeting during which Mr. Donnelly reported back to the membership the result of his investigation and the motion was tabled to amend the constitution. It appears that Mr. Moyes missed the meeting which would have been equivalent to his receiving the information from a union representative. Be that as it may, subsequently, the members were notified as to the nature of the motions to be voted upon. These were both described in writing and the culminating one hand-delivered to the membership. Mr. Moyes exercised his right to vote against it and other members notified could have done the same. All the other members in attendance at the March 20th meeting voted for merger with the applicant.

8. The respondent raised the issue of whether all the members of the JEU had a genuine opportunity to vote in view of the fact that March 20th was a Sunday and the meeting was convened at 11 a.m. Mr. Donnelly, in response to questions by counsel for the respondent, indicated that meetings of the JEU are not "regular" and are convened when there is specific "business" to be dealt with. The attendance varies – the highest being around negotiations. Mr. Donnelly indicated the JEU always had its meetings on Sundays at 11 a.m. and that this was the time over the years that seemed best for everyone. He also indicated he had never had any complaints about this meeting time. The respondent also pointed out that for the March 20th meeting only 10 employee/members attended

whereas there were a total of 22 members according to Keith Pogue's evidence. On this basis and in view of Mr. Moyes' concerns, which the respondent felt may have been reflective of some of the 12 members not in attendance, the respondent submitted that a vote ought to be conducted by the Board so that harmony within the unit could be assured.

9. Other relevant Articles of the JEU constitution are Article 4 and By-laws 3, 4, 13(a), (c), (d), (e) and (f) which provide:

#### ARTICLE 4. MEMBERSHIP

Any employee within the classification represented by this organization shall be eligible for membership therein, and may continue to be a member so long as he is employed by the Jaeger Machine Company of Canada, Ltd., St. Thomas Plants, in a classification represented by this organization.

#### BY-LAWS

#### 3. QUORUM AND MEETING

A majority of the slate of officers shall form a quorum for the transaction of business. No formal notice of any meeting shall be necessary and notice thereof may be given either personally, by telephone, or by any other means and, except in case of emergency, not less than one day before meeting is to take place. The Officers may consider any business, either special or general, at any meeting of the membership.

#### 4. VOTING

Questions arising at any meeting of the Officers shall be decided by a majority of votes. In case of an equality of votes, the president, in addition to his original vote, shall have a second or casting vote.

#### 13. MEETINGS OF MEMBERS

(a) Regular meetings of members shall be held at such time as the officers may determine.

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(c) Notice of all regular or special meetings of members shall be given to all members at any time but no meeting shall be considered invalid by reason of any member not receiving such notice. Posted Notices may be used.

(d) A quorum for the transaction of any business of any meeting of members will consist of not less than eight (8) members present in person.

- (e) At all meetings of members, each member shall be entitled to one vote on any one question and no member shall be allowed to vote by proxy.
- (f) At all meetings of members, every question shall be decided by a majority of the votes of the members present in person. Such votes will be by a show of hands, or, if requested, a poll may be demanded by any member. In case of an equality of votes at any general meeting of members, the President shall be entitled to a casting vote.

10. We are satisfied that the requirement of the constitution and by-laws were met. There was no evidence or argument presented to us that they were not.

11. The Board's chief concern in an application under section 62 is that the predecessor's constitutional provisions for a merger have been followed. Where there are no such constitutional provisions, the Board has required unanimous approval of the merger by the membership (see *Zehrs Markets Division of Zehrmart Limited*, [1977] OLRB Rep. Oct. 63 for a review of the Board's jurisprudence). That concern has been satisfied. Mr. Moyes' complaints do not amount to a substantive challenge to the procedures the JEU followed. These procedures gave him and all the other members the chance to vote on the proposed merger. Ten attended to vote, twelve did not. The amendment to the constitution, also voted upon in the normal course by the members, specified that a majority vote of members in attendance is sufficient to carry a merger motion. Nine of the 10 who attended carried the motion. Mr. Moyes' ballot was the only cast against the merger motion. Nothing has been shown by Mr. Moyes to have been wrong in all of this, therefore his submission that the Board not grant the requested declaration must be rejected.

12. The respondent made a strong argument that it was seriously concerned that the fulfillment of the constitutionally required procedures does not necessarily satisfy the necessity that there be an expression of the true wishes of the membership regarding the merger. The Board should be concerned about what their true wishes are. The respondent argued that the evidence in that respect is deficient and the Board ought to order a representation vote pursuant to section 62(2) to allow the expression once and for all of those wishes and to clear up any "misunderstandings" (which could be similar to Mr. Moyes').

13. We have decided that a representation vote ought not to be ordered. There has been nothing led in evidence from which we could conclude there was widespread misunderstanding among the members similar to Mr. Moyes' and which caused the attendance at the meeting of March 20th to have been what it was. We are also not convinced from anything put in evidence by Mr. Moyes that there has been any interference with the expression of the members' true wishes regarding the merger. Essentially, the Board looks upon a merger by trade unions as an internal procedure, subject to the overriding supervision of the Board. Section 62 allows the Board to make a declaration that the procedures have been properly followed to effect such merger. While at one time the Board required that a merger should be approved by a majority of employees in the bargaining unit regardless of internal procedures, the Board has



subsequently recognized that constitutional provisions, if any, should prevail and only if there are no such provisions should the Board require unanimous approval. This approach is reflective of the Board's determination that the members are the best judges of what should be necessary to effect a merger with another union. On this basis the Board is unwilling in the instant application to second-guess the judgement of the members who received notice in the normal course for the meeting which amended the Constitution and who ultimately received personal written notice of the culminating membership meeting called to vote on the proposed merger. It is certainly not clear that the members who did not attend both these meetings would have opposed each motion. It is equally possible to conclude the members not in attendance favoured the motions and deemed it unnecessary for them to attend in view of the support each motion had from members who were planning to attend and vote. Therefore, we are not able to conclude from the evidence that the result of all the steps taken by the JEU was not reflective of the true wishes of the membership and the respondent's request is denied.

14. Therefore, the Board hereby declares that the applicant has acquired the rights, privileges and duties under this Act possessed by the JEU.

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**0396-83-U Retail, Wholesale and Department Store Union, Complainant, v. Knob Hill Farms Limited, Respondent**

Adjournment – Constitutional Law – Practice and Procedure – Unfair Labour Practice – Whether Board practice in unfair labour practice proceedings contrary to *Charter of Rights and Freedoms* – Board finding reverse onus in Act not breaching presumption of innocence provision in Charter – Board not adjourning proceedings to permit application to courts

**BEFORE:** E. Norris Davis, Vice-Chairman and Board Members E. J. Brady and S. Cooke.

**APPEARANCES:** *Stanley Simpson and Carole Currie for the applicant; Michael Gordon, Thomas Stefanik and Howard Wood for the respondent.*

**DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN AND BOARD MEMBER S. COOKE; July 13, 1983**

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent has contravened sections 3, 64, 66 and 70 of the Act.

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3. The respondent raised as a preliminary objection the jurisdiction of the Board to direct the respondent to proceed first in the calling of evidence as is the Board's practice in application of section 89(5) of the *Labour Relations Act*. It was the respondent's position that section 89(5), together with the administrative practices developed by the Board in relation thereto, is in conflict with sections 2(b), 7, 11(c) and (d) of the *Canadian Charter of Rights and Freedoms* and cannot stand.

4. The respondent noted that section 2(b) of the Charter defines as a fundamental freedom, “the freedom of thought, belief, opinion and expression including the freedom of the press and other media of communication”, and that the Board’s jurisprudence makes the holding of certain beliefs or opinions or the expression of such by an employer as one of the cogent facts to be evaluated in the Board’s determination of whether or not the employer has contravened the Act. The Board was referred to its established jurisprudence that a finding by it that the employer’s conduct was in any part motivated by an anti-union animus results in the conclusion that the employer has contravened the Act. It is argued that such Board practice is contrary to section 2(b) of the Charter. The respondent also made reference to section 7 of the Charter which provides a right to everyone of “life, liberty and security of person”.

5. It was noted that section 11(c) of the Charter provides that “any person charged with an offence has the right ... not to be a witness in proceedings against that person in respect of the offence”; and that section 11(d) of the Charter provides for the right “to be presumed innocent until proven guilty”. It was argued that section 89(5) of the *Labour Relations Act* interferes with the presumption of innocence by compelling the respondent to call evidence without first requiring the complainant to establish a prima facie case. And further, that the Board’s jurisprudence in a case such as the instant one is that the failure of the employer to call evidence results in the conclusion by the Board that the allegations in the complaint will be taken as proved. It is argued that this places the respondent in the position that in order to answer the complaint involves a violation of its rights under the Charter.

6. The respondent noted that section 24(1) of the Charter clearly establishes that the enforcement of constitutional rights is a matter for a Court of competent jurisdiction. In the view of the respondent this created a conundrum in that the respondent cannot apply to the Courts for enforcement of its rights unless and until the Board concludes that, in the circumstances of the case, there is no right to be enforced. In the event the Board so concluded and decided to proceed the respondent could then be placed in the position by calling of evidence to be considered to have waived its rights which it cannot do.

7. The respondent referred the Board to its decision in *International Ladies Garment Workers Union v. Third Dimension Manufacturing Limited*, [1983] OLRB Rep. Feb. 261 as being the only reported decision of the Board dealing with the constitutional validity of section 89(5) of the Act. Counsel argued that the matter here had not been raised as a preliminary matter going to the Board’s jurisdiction and that this panel should not consider itself bound by what were termed obiter statements in that decision. Moreover, counsel argued that the case on its face was wrong in law and should not be continued to be followed by the Board. Counsel was aware of a later Board decision, as yet unreported, in Board’s files 2261-82-U, 2286-82-U, 2287-82-U, 2370-82-U in the case of *The Constellation Hotel Corporation Ltd.* but did not have that decision before him at the time of argument. [Note this decision has since been reported at [1983] OLRB Rep. Mar. 335]

8. The Board orally ruled, with Board Member E. J. Brady dissenting, against the respondent’s position and was requested by counsel for the respondent to reduce such oral ruling to writing, which it now does. The Board was of the opinion that its decision

in the case of *The Constellation Hotel Corporation Ltd.*, *supra*, establishes the Board's policy in the matter raised and deals with the issues raised in a definitive way and is one which this panel of the Board should follow. The Board noted that the procedural requirement for the employer to proceed first for reasons akin to those existing in arbitration cases of discharge or discipline, namely, that the employer is the party in most complete possession of the facts. The Board noted that the reverse onus is a matter of evidence and procedure and raises no presumption of guilt. The Board also noted that the burden is only triggered where there is no evidence before the Board or where the evidence before the Board is equally balanced.

9. Following the ruling the respondent noted that the Board had made no explicit reference to the effect of section 2(b) or section 7 of the *Charter of Rights and Freedoms* and on that ground requested the Board re-consider its ruling. The Board refused the request for re-consideration and stated that the submissions initially made by the respondent in respect to section 2(b) and 7 did not detract from its initial ruling.

10. A request for an adjournment by the respondent to permit it to apply to the Courts was denied, and the Board ruled it would proceed.

11. The complainant was granted leave to amend its Complaint by the following further particulars,

- (a) paragraph 33 to read "On or about February 17, 1983 at the Cherry Streett store, Wayne Harrison, Assistant Manager, told several employees that he knew who had signed for the Union".
- (b) paragraph 34 to read, "On or about March 4, 1983 the said Wayne Harrison worded a petition for distribution to employees which indicated that the employees did not wish a union to represent them".

12. The respondent sought to have particulars in paragraphs 4, 5, 6, 7, 8, 9 of the complaint's particulars as having occurred six months ago prior to filing of the complaint. The Board was of the opinion that where, as here, the issue is a course of conduct the particulars should stand.

13. Paragraphs 11, 14 and 15 of the particulars relate to a previous complaint and its settlement to which the respondent objected as derogatory from the entire settlement process. The Board ruled that the particulars are limited to the existence of the prior complaint and the terms of settlement and not to go into the process or the reasons for settlement.

14. In paragraph 16 of the particulars the respondent sought clarification as to whether it was being alleged that the respondent had conspired with the named employee. The complainant clarified that its allegation is that the named employee was acting on behalf of the respondent.

15. The complainant stated that the facts in paragraphs 17, 18 and 19 of its particulars are pleaded to establish a course of conduct engaged in by the employer: and

that paragraph 20 is merely a chronological fact. The complainant clarified that paragraph 23 is not alleging a violation of the Act but is pleaded to establish the fact that a complaint was made.

16. The proceedings were adjourned to 9:30 a.m. August 3rd, 1983.

17. The Board noted that the panel of the Board as presently constituted was not seized of the matter.

#### **DECISION OF BOARD MEMBER, E. J. BRADY;**

1. Mr. Gordon argued that section 89(5) of the *Labour Relations Act* can no longer be valid law in Ontario because of section 7 and section 11 of the Canadian Charter of Rights and Freedoms. His argument was persuasive and I agree with it.

2. I believe that section 11(c) and (d) of the Charter applies to offences under the *Labour Relations Act*, and not just to criminal matters. A party before our Board cannot be compelled to be a witness in proceedings against that party in respect of the offence and is entitled to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

**0340-83-M** United Brotherhood of Carpenters and Joiners of America Local 1316, Applicant, v. **Losereit Sales and Services Ltd.**, Respondent

Construction Industry Grievance - Practice and Procedure - Prior Board decision holding trade union estopped from pursuing grievance - Parties and facts in second grievance identical - Whether Res Judicata and Issue Estoppel applicable - Board declining to arbitrate grievance

**BEFORE:** Corinne F. Murray, Vice-Chairman, and Board Members I. M. Stamp and H. Kobryn.

**APPEARANCES:** David McKee and Richard Harkness for the applicant; Martin Addario and H. Losereit for the respondent.

#### **DECISION OF THE BOARD;** July 20, 1983

1. This is a referral of a grievance to arbitration under section 124 of the *Labour Relations Act*. Form 104 filed by the applicant in this matter indicates at paragraph 5 that the matter referred to be arbitrated is in Appendix "A". Appendix "A" is a Grievance Form dated May 11, 1983, signed by R. Harkness. The Form, as checked off or filled in, discloses the following:

(i) that it is a policy grievance;

(ii) that the date of grievance or circumstances giving rise to its occurrence was April 10, 1983;



- (iii) that the date of actual knowledge by the applicant was April 10, 1983;
- (iv) that the nature of the grievance is: "The employer is a drywall contractor working on Grey Owen Lodge, Markdale, Ontario. The employer has employed individuals on this site, none of whom is a member of Carpenter's Local 1316 and none of whom have obtained referral slips from the Local Union.";
- (v) that the portion of the provincial collective agreement between the Carpenters Employer Bargaining Agency (E.B.A.) and The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America (O.P.C.) effective from June 21, 1982 to April 30, 1984 alleged to have been violated was Article 5 of the Acoustic and Drywall Appendix;
- (vi) that the remedy sought was damages.

Also attached to Form 104 is a letter dated May 10, 1983 from counsel for the applicant wherein the respondent was advised regarding the filing of the grievance (Appendix "A") and the applicant offered to supply its men to the respondent at wage rates and travel allowances paid to carpenters from Local 785 which are lower than those of Local 1316, who were then working on the project contrary to Article 5. The cause of this offer was the applicant's interpretation of a previous decision by a differently constituted panel of the Board involving the applicant and the respondent where the Board found that the applicant was estopped from enforcing Article 5 of the Acoustic and Drywall Appendix of the provincial collective agreement. That panel found the applicant was estopped from making such a claim in connection with any projects the respondent bid prior to notice (by way of the filing of the grievance on February 10, 1983) that a local area practice whereby Local 785 did work in part of Local 1316's geographical jurisdiction would no longer be tolerated by the applicant.

2. The respondent raised a preliminary objection to this panel's consideration of the grievance dated May 11, 1983 (hereinafter referred to as the "second grievance") because the matters raised by it were already dealt with by the Board in its determination of the February 10, 1983 grievance (hereinafter referred to as the "first grievance"). The respondent argued that the latter decision makes the matter *res judicata* or raises "issue estoppel". The respondent also argued, among other reasons which will be more fully set out below, that we should not entertain the second grievance because of section 146 of the *Labour Relations Act*.

3. The applicant denied that there is an identity between the two grievances sufficient to create *res judicata* or issue estoppel because the second grievance raises different facts from the first. The difference arises from "the removal of the detrimental aspect which the respondent would have suffered" if it was forced to employ Local 1316's members on already bid jobs (the bidding having been based on the anticipated payment of carpenters from Local 785 who command a lower rate). The panel constituted to deal with the first grievance had found detrimental reliance to have been present because of the difference in wage rates, room and board and travel allowances and the impact of this on jobs already bid.

4. The applicant and the respondent agreed to the following facts and indicated that these were the only ones necessary to consider the preliminary point they wish to argue. It was agreed at the hearing that prior to our dealing with the merits of the grievance, we would decide the issue of whether the principles of *res judicata* or issue estoppel were applicable to the grievance or whether there was any other reason why the merits should not be heard. It was agreed that:

- (1) The Grey Owen Lodge project was bid by the respondent on or before December 16, 1982.
- (2) The bid was accepted prior to February 10, 1983 (the date of the first grievance). It was impossible to change the bid. All relevant things necessary to complete the bid took place prior to the first grievance.
- (3) The letter of Mr. McKee dated May 10, 1983, was received by Mr. Addario on that date. The respondent confirmed in its Reply that it would not hire members of Local 1316. Work by Local 785 members began on May 13, 1983.
- (4) The value of the respondent's portion of the Grey Owen Lodge project is \$44,890.00.
- (5) The second grievance was not delivered to Mr. Addario until May 16th, when the referral (Form 104) was delivered; the respondent received both on May 24th.
- (6) Since that date, there has been no request for carpenters from Local 1316, although the work has continued.
- (7) The decision with respect to the first grievance was rendered on March 31, 1983.
- (8) A request for reconsideration was made by the applicant on May 2, 1983; no ground was raised with respect to bid but subsequently manned jobs.
- (9) The reconsideration request was rejected on May 11th and the original decision of March 31, 1983 was confirmed.
- (10) We remain seized regarding the assessment of damages.

5. In order to comprehend the applicant's position it is necessary to set out in full paragraphs 12 and 13 of the reasons for the March 31, 1983 decision:

12. Having regard to all the evidence and the submissions of the parties, we are satisfied that all of the elements of estoppel are present in the instant case. It is reasonable to infer in the circumstances that Local 785 and, through it, the Council, of which it

is an affiliate, were aware that the respondent has used only members of Local 785 on projects in the five counties, and has not used any members of Local 1316 as required by the provisions of Article 5. It is also apparent that the Council and its affiliates have acquiesced in the respondent's practice and, by not complaining, grieving, or objecting to that longstanding practice in any way, have led the respondent to believe that its practice is acceptable to the Council and its affiliates, including Locals 785 and 1316. Relying upon that acquiescence, the respondent has in good faith bid on and obtained work at a number of projects on the basis of the Local 785 wage, travel and board payments set forth in the Appendix. The detriment which the respondent would suffer if the grievance were to succeed is quite clear; it would not only be required to pay its "key men" (and any other workers from Local 785 whom it was entitled by Article 5 to use on the projects) the difference between the wages and related payments specified in the Appendix for Local 785 and Local 1316, but would also have to pay to Local 1316 compensation equivalent to the wages and related payments that the members of Local 1316 would have received if they had been employed on the project. *Under the circumstances, it would be quite unfair and inequitable to permit the Council or the applicant, which is an affiliate of the Council, to assert rights under Article 5 in respect of the Owen Sound project, or in respect of any other projects in the five counties on which the respondent bid prior to being notified of this grievance.* As a matter of labour relations policy, it is neither desirable nor permissible for one affiliate, such as Local 785, which is the "union" with which an employer maintains an ongoing, day-to-day working relationship, to knowingly accept the benefit of having its members employed on a substantial number of projects outside its geographical area in violation of the Appendix, without being taken to have in any way impaired the ability of another affiliate, bound by the same Appendix and linked through the Council, to seek the strict enforcement of its rights under that Appendix, which forms part of the Provincial Agreement, negotiated by the Council (as part of the E.B.A.) on behalf of its affiliates. At some point in time, which in the circumstances of the present case was reached considerably in advance of the fifth year in which a provision such as Article 5 has been in force, the knowledge of an affiliate (such as Local 785) concerning an employer's practice which is inconsistent with such provision, can reasonably and properly be imputed to the Council, and through it, to the other pertinent affiliate, such that neither the Council nor the other affiliate can begin to saw off the limb onto which the employer has been permitted to go, without duly notifying the employer of their intention to revert to their strict rights under the Appendix. *However, by filing the present grievance, the applicant, on behalf of itself and the Council, gave the respondent such notice in respect of the application of Article 5 to projects in the five counties, and thereby brought the estoppel to an end in respect of any projects thereafter bid upon in that area by the respondent.*

13. In view of our disposition of this matter, it is unnecessary to determine whether, as contended by the respondent, the applicant is also estopped from succeeding with this grievance by virtue of its (alleged) failure to take adequate steps to "police" the acoustic and drywall work performed by the respondent within its geographical area.

(emphasis added)

### SUBMISSIONS

6. The respondent argued, firstly, that the decision of March 31st completely covers the precise issue before us. Both grievances deal with the applicant's rights under Article 5, namely, the requirement that the respondent take at least one man (of a two-man work force) from Local 1316. That right was asserted in the first grievance and is reasserted in the second. Article 5 is the location of that right and this Article was the basis for the first grievance. The decision of March 31, 1983, reveals the extent to which the applicant is estopped from asserting its rights under Article 5. The extent is to any other projects bid prior to February 10, 1983, the date of the original grievance. Therefore, since the project now in dispute was clearly bid before that date, it is covered in the original decision. The second argument which the respondent advanced was that the applicant should and could have in its request for a reconsideration, which request was made on May 2nd, dealt with the Grey Owen Lodge project. On the face of the second grievance, the applicant claims knowledge of this project as of April 10, 1983, which is prior to its application for reconsideration. Even if that is incorrect, it still could have anticipated the situation of a project having been bid but where the hiring of employees was yet to be accomplished and therefore the detrimental reliance being removable by Local 1316 for those hirings. Having not raised this matter in the proper forum, i.e. before the first panel, the applicant ought not to be able to raise it as if it were a fresh issue. The respondent cited two decisions of the Board which establish that the Board has utilized the doctrine of *res judicata* or issue estoppel (even when sitting as an arbitration board under section 124 of the Act). The first decision cited was *Napev Construction Limited*, [1980] OLRB Rep. June 862, where the Board stated the following general propositions:

17. As indicated above, counsel for Napev contended that boards of arbitration do not apply the doctrine of *res judicata* and that accordingly, this Board should not do so in proceeding under section 112a [now section 124]. In fact, certain boards of arbitration have applied a principle analogous to *res judicata*. See: *Re Canadian Union of Public Employees, Local 207, and City of Sudbury*, 15 L.A.C. 403 (Reville). Further, even if we were to assume that boards of arbitration have generally declined to do so, nevertheless, we are satisfied that this Board in an appropriate case should be prepared to apply a principle analogous to *res judicata*. Unlike "private" boards of arbitration which are generally "ad hoc" in the sense of being established solely for the purpose of hearing and determining a single grievance, this Board has been constituted by the Legislature as a permanent tribunal. It seems to us only reasonable that the Board should be able to rely on its own previous decision involving issues which have been litigated between the same parties, and that this



should be just as true in proceedings under section 112a as in any other proceedings. Experience has taught us that many of the grievances referred to the Board under section 112a of the Act involve complex issues of fact and law which take much time to determine. When such issues have been litigated an unsuccessful party should not be permitted to re-litigate them all over again.

The Board in that decision concluded that since the parties were the same and the same issues had been argued and decided in previous proceedings under section 124 (formerly section 112a), the respondent ought not to be able to re-litigate a particular defence made in the previous proceedings and rejected therein. In paragraph 19, the Board dealt with a contention by counsel for the respondent that there were facts additional to those heard by other panels of the Board in the previous decisions which could cause a subsequent panel to come to a different conclusion in the following way:

19. In reaching this conclusion we have considered the contention of counsel for Napev that there are certain facts which, if placed before the Board, might cause the Board to conclude that bargaining rights do not exist with respect to bricklayers. We have also taken into account his claim that The Toronto and District Building Trades Council has not come before the Board with "clean hands" since it did not earlier inform the Board of these alleged facts. The difficulty with these contentions is that if Napev felt these alleged facts to be relevant, it could have sought to lead evidence with respect to them at the time of the initial proceedings in File No. 0945-75-M. Having chosen not to do so, it is not open for the company to seek to have the matter re-litigated on the basis of evidence which it could have advanced before. In this regard we would refer to and adopt the following statements of Wigram, V.C., in *Henderson v. Henderson*, 67 E.R. 313:

"... where a given matter becomes the subject of litigation, and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

Counsel for the respondent argues on the basis of this case that not only was the whole issue decided between the same parties in the preceding grievance application, but also the factual situation the applicant now presents could have been brought forward as part

of the original case or, at the very least, as a part of the reconsideration application. The *Oakwood Park Lodge* decision, [1980] OLRB Rep. Oct. 1501, was cited to show the kind of factual difference which would cause the Board to re-litigate an issue that had apparently been decided. In that case the issue of whether RNs were managerial or not had been decided in the context of a certification application by a different bargaining agent at a period of time where there could be significantly different terms and conditions of employment. One of the changes which had taken place since that time was in the number of such personnel. In discussing the general powers the Board possesses which would allow it to apply the doctrine of *res judicata*, the respondent relied on the statement of the Board in *Oakwood Park Lodge* that it could apply this doctrine in a proper case, even though the Act did not expressly authorize it, because there were strong practical and policy grounds for doing so. The third argument advanced by the respondent was that the applicant should not be allowed to make a special "deal" regarding this project which flies in the face of the provisions of the collective agreement. The special deal was the waiver of the requirement that the wage schedules for Local 1316's members be honoured. The respondent submitted that there was no basis in law for this arrangement and, in fact, sections 146(1) and (2) expressly prohibit "any other arrangements" which are contrary to the provincial collective agreement. Therefore the factual foundation for the applicant's case is essentially null and void. There is no lawful way the respondent could enter into this "deal". These proceedings should not be used as a means for rendering lawful what is essentially unlawful. The previous panel of the Board could have described the estoppel to have only prevailed if Local 1316 insisted on its proper wage rate. The Board would not have done that because this would amount to sanctioning or ordering a contravention of sections 146(1) and (2). This panel is in no sounder or a better legal position to make the order requested. The fourth argument made by the respondent was that the May 10, 1983 letter from counsel for the applicant constituted an offer of settlement which was inadmissible before us.

7. The applicant argued that the issue before us was not whether or not there was a binding decision but, rather, the issue was the manner in which it bound the parties. He submitted that if this grievance had simply alleged a violation of the collective agreement and requested the hiring of Local 1316's members with all the required wages, then he would agree that the issue had been dealt with by the previous panel, although, even in this form, it was not a grievance which the previous panel was seized with in any event because there are different issues involved. The difference between the two grievances exists on two levels:

- (1) The second grievance is in connection with a different project from the first grievance, so that in the narrow sense of the doctrine of *res judicata*, the fact situation and the issues created thereby have not already been dealt with.
- (2) The second grievance followed an offer by Local 1316 "not to enforce those parts of the collective agreement which the previous panel found the employer could not reasonably believe would have been enforced because of the existing local area practice".

When counsel was asked what "those parts of the collective agreement" were, counsel indicated that it was primarily the wage rate and travel allowances, neither of which was

claimed in this grievance and the latter of which was not claimed in a previous grievance. The applicant claims the offer which the applicant made was in keeping with "the ratio" of the Board's decision of March 31, 1983. Counsel for the applicant described the first grievance before the Board as a "simple damages claim" whereas the second grievance could be described as simply to do with the hiring of men. The demand made in the second grievance was not that Local 1316's members be hired and the collective agreement be enforced, but, rather, it was a demand for the hiring of Local 1316's members without those clauses of the collective agreement detrimental to the employer being enforced as well. The applicant argued that this offer preceding the grievance was a "compliance" with the Board's finding that the applicant was estopped, i.e., it would be inequitable or unjust to allow the applicant to enforce provisions upon which the respondent, in its bidding, had believed would not be enforced. What the offer does is eliminate the difference in wage rate that the members of Local 1316 should otherwise have been entitled to so that the respondent would be paying no more than it anticipated in making its bid. The position of the applicant is that if the detriment has been removed, then the estoppel "disappeared" as of May 10, 1983, insofar as this bid job was concerned. The act of filing a grievance and/or making the offer effective brings the estoppel found by the previous panel to an end. The applicant cited a number of authorities to us which set out the doctrine of *res judicata* and how it should be applied generally and in particular to arbitration proceedings. In *Re Algoma Steel Corporation Limited and United Steelworkers Local 2251*, (1982) 6 L.A.C. (3d) 346, the arbitration board refused to hear a grievance which it found involved an issue that had already been decided between the same parties in other proceedings. The applicant distinguished this case on the basis that the similarities that existed between those grievances do not exist between the two grievances filed by the applicant. This case showed the application of the doctrine in the "narrow sense" where the same grievance was found relating to the same employees in the same period of time in the same location. The applicant contrasted the facts in that case with those before us because the grievance at hand deals with a different project and not one already decided upon by the Board. The applicant readily conceded that the effect of the decision of March 31, 1983 was to estop them from enforcing the entirety of Article 5 but it did not estop it from enforcing that part relating to the hiring. The applicant described the question before us as being: "Is the applicant estopped from enforcing those parts of the collective agreement which the respondent could reasonably have expected the applicant to enforce"? It was clear from the previous decision that the respondent could not have reasonably expected Local 1316 to enforce the wage rates and the travel allowances. But that did not necessarily lead to the conclusion that it could not necessarily expect that the applicant would not enforce its right to have its people on the job. If Local 1316's members are not on the job, then Article 5 would be breached with respect to one of the two carpenters employed. The applicant's response to the argument that it should have raised this matter by way of its reconsideration request was that it was not a matter that could legitimately be raised by reconsideration. The applicant believed it was too late to make a similar kind of offer in connection with the project at issue in the previous grievance. That grievance had been an "all or nothing" proposition. The temporal extent of the estoppel identified in paragraph 12 of the decision was not an order of the Board, i.e., that Local 1316 is ordered not to grieve any job bid prior to February 10, 1983. All that the Board did was to describe the extent of the estoppel found. The issue now before this panel was not one with which the previous panel was seized and, therefore, a reconsideration request, based in whole or in part on this offer of employing Local 1316's members at a lower rate in connection with the Owen Sound project, could not have been made. The panel asked the applicant whether it was not



abnormal for one Local to work at the rates of another Local whose members are paid at a lower rate. The applicant acknowledged that it was abnormal. The panel also asked whether, in the normal case, when estoppel is brought to an end, there is a reversion to the strict rights of the collective agreement and that it is unusual to remove estoppel without the complete reversion to the rights of the collective agreement. The applicant agreed that what was done here was an unusual way to bring estoppel to an end. The applicant justified this approach by indicating that the offer was an attempt to fulfill the employer's expectations, while at the same time salvaging the right of Local 1316 to have its members at work in projects within its geographic boundaries. The applicant distinguished the *Napev* case from the fact situation before us because in *Napev* *res judicata* in the narrow sense was properly applied. The applicant also distinguished the *Oakwood Park Lodge* decision on the same basis. The applicant cited a Supreme Court of Canada decision, *Angle v. Minister of National Revenue*, (1974) 47 D.L.R. (3d) 554, which, although a taxation case, sets out the principles of *res judicata* applicable beyond the special subject matter considered. That decision stands for the proposition that issue estoppel only arises where the determination on which it is sought to establish the estoppel is so fundamental to the decision made that the latter cannot stand without the former. The applicant argues that the previous decision did not deal with bid projects which were yet to be manned, and even if it did, it was not fundamental to the previous decision. In response to the respondent's third argument that the result of the grievance before us is an attempt, through these proceedings, to make an arrangement contrary to the provincial collective agreement, the applicant says that there is no such attempt being made. Correctly perceived, it is an attempt "to live by" the Board's previous decision by removing reliance on all portions of the collective agreement which would be unfair or inequitable for the applicant to rely on. This grievance enforces Article 5, exclusive of wages and travel allowances. In any event, the Board under section 91 of the Act has jurisdiction to amend a provincial collective agreement and, therefore, if this grievance entailed an amendment, the Board would have jurisdiction to do so, notwithstanding section 146. Finally, the applicant argued that the letter of May 10, 1983 is a *with prejudice* offer which would be admissible before us.

8. In reply, the respondent indicated that the applicant's focus on its enforcement of a part of Article 5 was not the correct description of the issue before us. The wage rates and travel allowance which the applicant has waived are not a part of Article 5. They are set out in Article 6 and one does not get to Article 6 until one has established under Article 5 that the Local is entitled to have its members there in the first place. The previous Board has found it would be unfair and unjust to let Local 1316 assert its rights to such employment on behalf of its members under Article 5 and the applicant ought not to be allowed to re-assert its rights under Article 5 which have already been decided. On the issue of reconsideration, the respondent disputed the applicant's assertion that it would have no grounds for reconsideration before the other panel. The respondent contended that the applicant could have alleged not only that there were no grounds for the Board's original conclusion (which it did), but it also could have expressed surprise at the reference to other projects bid and argued that there was no jurisdiction in the Board to deal with other projects because such projects were not a part of the grievance or, alternatively, that since the decision only dealt with detriment insofar as wages are concerned, the applicant would be still entitled to require employment of its members pursuant to Article 5 on such other projects which, as of the day of decision, were unmanned.



9. The grievance dealt with by the Board in its March 31, 1983 decision was a policy grievance, although pertaining to or arising out of circumstances in a particular project, i.e., the Article alleged to have been violated was Article 5 of the Acoustic and Drywall Appendix and the remedy sought was damages. Article 5 of the Acoustic & Drywall Appendix provides:

**ARTICLE 5 - UNION SECURITY**

(Special Provision)

(This Special Provision shall replace Article 5 in the master portion of the Agreement.)

(a) (i) The employer agrees to only employ members in good standing of the United Brotherhood of Carpenters and Joiners of America to perform all work, within Article 19 of this appendix.

(ii) If an employer is a partnership or corporation, not more than one member of the firm shall work with the tools.

(b) All employees covered by this Appendix shall be hired through the offices of the affiliated Local Unions. However, it is agreed that the employer may recall former employees who have worked for the employer within the last six months prior to recall through the affiliated Local Union office, provided the employee is unemployed and registered at the affiliated Local Union office on the date of recall. All employees before commencing work, must obtain a Referral Slip, from the affiliated Local Union or District Council.

(c) Notwithstanding the provisions of Section (b) the employer may transfer the first two key men from one geographical area to a project located in the geographical area of another affiliated Local Union. The next two (2) employees shall be hired from the affiliated Local Union and thereafter one employee from outside the geographical area and one from the affiliated Local Union area, to a maximum of a twelve man crew. An employee who is transferred from one area to another shall be paid the rate of wages in the area from which he was transferred or the rate in the area to which he was transferred whichever rate is the greater. This twelve man crew is defined as six men from outside the geographical area and six men from the affiliated Local Union's area. If the affiliated Local Union in the other area cannot supply sufficient competent workmen, additional employees may be transferred as agreed upon between the employer and the affiliated Local Union in the other area.

It is understood that, if the Local Union or District Council is unable to provide the required competent workmen within two (2) working days, the employer is free to hire such manpower as is available, but such manpower shall, as a condition of employment before commencing work, apply to the affiliated Local Union having jurisdiction for the job or project where said manpower is working,

and shall comply with all the applicable union regulations for membership therein.

(d) Where a project is located in a jurisdictional area other than that where the main business office of the employer is located, and where the project shall only require two men to complete, the employer must hire at least one of the men from the other affiliated Local Union. Prior to commencing a project the employer shall notify the affiliated Local Union or the District Council as to whether the project shall require two or more than two men to complete.

(e) Where a project is located in the area which has no affiliated Local Union, the employer may transfer any number of employees, who are members of the United Brotherhood of Carpenters and Joiners of America, to the project.

(f) All employees from other jurisdictions shall report to the affiliated Local Union office in which the job is located before proceeding to work.

(g) The employer shall lay off in reverse order of hiring as stipulated in Article 5 subsection (c).

(h) No person shall be refused employment or Union membership because of his/her sex, race, colour, creed, age or national origin.

Article 6 of the Appendix states:

#### **ARTICLE 6 - WAGES AND METHOD OF PAYMENT**

(a) The following wage rate schedules are inserted as part of the Agreement. Where, in any geographic area, no schedule appears in this Appendix, the schedule for Carpenter in the master portion of the Agreement shall apply.

Subsections (1) and (2) of section 146 of the Act provides:

146.(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other

than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

Subsection (1) of section 91 of the *Labour Relations Act* provides:

The Board may inquire into a *complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class*, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

(emphasis added)

#### DECISION

10. A comparison of the grievance forming the foundation of the first panel's decision and the grievance which initiated these proceedings reveals that, except for the projects named, they are the same, even to the description of the claim and relief sought. If the letter of May 10th from counsel for the applicant is examined as containing a fuller description, the essence of the claim remains the same, i.e., that Local 1316's members be employed. Only the damages of full wages at Local 1316's rates is abandoned. Logically, a claim for travel allowance where no travelling by Local 1316's members has occurred would not be made in any event. Both grievances are described as policy grievances, though each were relating to a specific (different) project. The issue before the previous panel was whether Local 1316 should be able to enforce its right, established under the collective agreement by Article 5, to insist that the respondent employ Local 1316's members to work on the project named. The issue before this panel is whether Local 1316 should be able to enforce its right, established under the collective agreement by Article 5, to insist that the respondent employ Local 1316's members working on another project.

11. The previous panel answered the question put to it in the negative, finding that it would be inequitable to allow Local 1316 to enforce its acknowledged right under Article 5 of the collective agreement against the respondent in the circumstances; that panel based its decision on the doctrine of estoppel. It found that the applicant ought not to be able to seek to enforce its rights under Article 5 because the respondent had detrimentally relied on a local area practice, acquiesced by Local 1316, which permitted the use of lower paid Local 785 members (a practice, strictly speaking, contrary to Article 5). The detrimental reliance proved was the expectation of the respondent in bidding for projects that the lower rates and different or no travel allowances would be payable.

12. The question is whether Local 1316 ought to be able to reassert its rights under

Article 5 to the employment of its people on another project which, though already bid in the expectation that Local 785's prices would be paid, the applicant has made identical in cost to that anticipated by the respondent in its bid.

13. We have determined that this grievance involves the very issue already presented to the previous panel. As the applicant's counsel correctly sets out in his able argument, there are two levels on which *res judicata* or issue estoppel operate. One of the cases he cited to us contains the most authoritative and complete description of the two levels (termed species in that judgement). In *Angle v. Minister of National Revenue*, supra, Mr. Justice Dickson, speaking for the majority, said at page 555:

In earlier times *res judicata* in its operation as estoppel was referred to as estoppel by record, that is to say, estoppel by the written record of a Court of record, but now the generic term more frequently found is estoppel *per rem judicatam*. This form of estoppel, as Diplock, L.J., said in *Thoday v. Thoday*, [1964] p. 181 at p. 198, has two species. The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a Court of competent jurisdiction. ... The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins, J., of the High Court of Australia in *Hoysted et al. v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537 at pp. 560-561:

I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue estoppel").

Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p. 935, defined the requirements of issue estoppel as:

... (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The contrast made between these two species of estoppel is reflective of the more rigid categorization of proceedings before the Courts. However, the distinction is applicable to the arbitral jurisprudence because distinctions still can and should be made between the general nature of a grievance and issues determined within it. The rationale behind both species is to ensure that repetitious litigation is avoided. This rationale is as applicable in the context of our proceedings as in those of the Courts. We are here concerned with something comparable to "cause of action" estoppel because the type of project in connection with which the grievance is lodged and the core of the claim made in



connection with it are identical to the ones already litigated, i.e., both are projects bid prior to February 10, 1983, and both require the employment of members of Local 1316. The difference is that the applicant in the grievance before us waives its right to the payment of its members at their normal rates. We think that this was a matter that could have been raised in the context of the original grievance when it became apparent to the applicant that such a waiver could allow that panel to describe the limits of the estoppel in different terms. The requirement to hire and what rates must be paid are normally interrelated, indivisible rights. If the applicant seeks to have them divided for jobs bid prior to February 10, 1983, it is incumbent upon it to raise this in the context best suited to the full consideration of the proposed division. While this may not have been possible in the initial proceedings, it was a recourse available to the applicant via reconsideration. The previous panel was dealing with a policy grievance. This meant that, strictly speaking, the issues to be resolved were intended to apply beyond the particular case and deal with all like cases. The Board's power of reconsideration is a plenary power (see *The Journal Publishing of Ottawa Ltd.*, [1979] OLRB Rep. Sept. 549) and could encompass this type of special unforeseen circumstance. The argument raised in the grievance before us could have been made either to avoid the estoppel being described in the terms it was or to argue for its alteration. It is noteworthy that as of the date of application for reconsideration, May 2, 1983, the applicant was possessed of the knowledge that there were bid, but as yet unmanned, jobs within the relevant area. The applicant should not, through a second grievance, put forward an argument which could reasonably have been litigated in the first instance (see *Henderson v. Henderson* quoted in *Napev*, supra). It would submit the respondent to a repetitious piece of litigation because the whole of the evidence from both the applicant and the respondent relating to estoppel could have been presented in the proceedings to do with the first grievance. This is the very repetition which the doctrine of *res judicata* is meant to avoid.

14. Even if the fact situation before us had been raised as a part of the first grievance, we are concerned that in describing the estoppel to be limited to bid but unmanned jobs and allowing Local 1316 to waive its rights to the rates set in the collective agreement for those jobs, the Board would be ordering the respondent to enter into an arrangement with Local 1316 which is contrary to the letter and spirit of sections 146(1) and (2) of the Act. While under section 124 we are sitting as an arbitration board interpreting the provincial collective agreement, we continue to be guardians of the integrity of that collective agreement and the legislation which supports it. The applicant candidly conceded that normally a Local, whose members commanded higher rates pursuant to schedules established under Article 6, could not agree to work for the lower rates of a sister Local. This is normally not done because such a "price war" within the ranks of the affiliated bargaining agents would decimate the carefully-constructed orderliness of the provincial collective agreement. It is clear that affiliated bargaining agents are subject to section 146 as much as other bargaining agents or other entities. For work within the ICI sector, the provincial agreement is the only agreement (see *Manacon Construction Limited*, (unreported), Board File No. 0165-82-R, dated March 17, 1983, at paragraphs 37 and 38). The refusal by the previous panel to allow the applicant to enforce its legal rights as set out in the collective agreement is a limited exception to the principle established in sections 146(1) and (2) that only one set of contractual terms, i.e., as set out in the provincial agreement, prevails. This limited exception is permissible because Local 1316 itself was found to have tolerated the circumstance for a significant period of time and the enforcement of the letter of the collective agreement would be unfair to the

respondent who has relied on the status quo. The effect of estoppel does come to an end and the collective agreement is eventually restored. What this second grievance attempts to do is have this Board itself create or assist in the creation of a new arrangement which is contrary to the spirit and letter of the collective agreement. It is one thing for the previous panel to refuse, for equitable reasons, to let the applicant revert to the strict letter of the provincial collective agreement after a long-standing local practice has lulled the respondent into believing it was permissible for Local 785 to do the work, and quite another for this panel to order the respondent to enter a fresh arrangement created by Local 1316 which, to our mind, would contravene the letter and spirit of sections 146(1) and (2).

15. Finally, we do not consider that our powers under section 91 allow us to amend collective agreements, except in connection with jurisdictional disputes (see, for example, *Harold R. Stark*, [1982] OLRB Rep. Feb. 222, application for judicial review dismissed June 8, 1983).

16. For all these reasons we consider that this grievance ought not to be arbitrated by us.

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**0165-82-R; 0212-82-R; 0227-82-R; 0258-82-R; 0374-82-R** United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, Applicant, v. **Manacon Construction Limited**, Respondent, v. Labourers' International Union of North America, Local 527, Intervener #1, v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, Intervener #2; United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, Applicant, v. M. Sullivan and Son Limited, Respondent, v. Labourers' International Union of North America, Local 527, Intervener #1, v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, Intervener #2, v. Labourers' International Union of North America, Local 247, Intervener #3; United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, Applicant, v. D'Angelo Plastering Company Limited, Respondent, v. Labourers' International Union of North America, Labourers' International Union of North America, Ontario Provincial District Council, and Labourers' International Union of North America, Local 527, Interveners; United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, Applicant, v. Leader Structures (Ontario) 1980 Limited, Respondent, v. Labourers' International Union of North America, Local 527, Intervener #1, v. Labourers' International Union of North America and Labourers' International Union of

North America, Ontario Provincial District Council, Intervener #2; United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, Applicant, v. S. R. Lentz Construction Incorporated, Respondent

**Bargaining Rights - Bargaining Unit - Certification - Construction Industry - Reconsideration - Trade Union - Reconsideration of earlier Board decision refused - Board not misinterpreting provisions of Act - Board's finding that applicant "affiliated bargaining agent" confirmed**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members H. Kobryn and J. Wilson.

### **DECISION OF THE BOARD; July 13, 1983**

1. The applicant ("Local 1030") has requested the Board to reconsider and revoke its decision in these matters which issued March 17th, 1983. Three grounds are cited for the request alleging that:

- (a) the decision is contrary to the earlier decisions of the Board in *Richard N. Steele Construction (1979) Ltd.*, Board File No. 0023-82-R and *Ottawa Door Consultants Ltd.*, Board File No. 0044-82-R;
- (b) the decision was based at least in part on grounds not argued before the Board; and
- (c) the Board incorrectly interpreted sections 137(1)(a) and 146(2) of the *Labour Relations Act*, a result of which is to deprive the employees affected of the freedom to join a trade union of their choice, a right guaranteed by section 3 of the Act.

Item (b) above appears to be a reference to the Board's finding that Local 1030 was represented by the millwrights employee bargaining agency for collective bargaining in the industrial, commercial and institutional ("ICI") sector of the construction industry and to a concern expressed by the Board in paragraphs 41 and 42 of its decision with respect to a problem which, potentially, could arise from Local 1030 being expressly prohibited by the terms of its charter from representing carpenters in the ICI sector.

2. The request for reconsideration was made by letter from counsel for Local 1030, the full text of which is set out hereunder.

We are acting on behalf of the Applicant in these matters. The Applicant is hereby requesting that the Board reconsider its decision dated March 17, 1983, pursuant to *Section 106(1)* of the *Labour Relations Act*.

It is submitted that the Board's decision is clearly contrary to its earlier decisions in the *Richard D. Steele Construction (1979) Ltd.*

case, Board File No. 0023-82-R and *Ottawa Door Consultants Ltd.*, Board File No. 0044-82-R. The Board also based its decision at least in part on grounds not argued before it and on which the Applicant, therefore, had no opportunity to make submissions. Finally, it is submitted that the Board's decision places an erroneous interpretation on its enabling statute and deprives employees the freedom to join the trade union of their choice, a right guaranteed by *Section 3* of the Act.

The Applicant (obviously) does not dispute the Board's conclusion on the first issue before it wherein the Board found (in paragraph 24) that the Applicant does have the authority to accept into membership the employees for whom it sought certification in these applications.

Furthermore, the Applicant does not dispute the Board's conclusion that it is a "trade union" within the meaning of *Section 117(f)* of the Act, which reads:

"'trade union' means a trade union that according to established trade union practice pertains to the construction industry."

In this case, the applicant's parent organization (the United Brotherhood of Carpenters and Joiners of America), other chartered locals of the United Brotherhood and the Applicant itself, in its brief history, clearly have a practice pertaining to the construction industry.

The applicant does, however, dispute the Board's conclusion that it is an "affiliated bargaining agent" within the meaning of *Section 137(1)(a)* of the Act. All of the Board's conclusions are based on this finding and if, as we respectfully submit, the Board is incorrect in this finding then all the Board's reasoning which follows is also incorrect:

*Section 137(1)(a)* reads as follows:

"'affiliated bargaining agent' means a bargaining agent that, according to established trade union practice in the construction industry, represents employees who commonly bargain separately and apart from other employees and is subordinate or directly related to, or is, a provincial, national or international trade union, and includes an employee bargaining agency."

Specifically, it is submitted that the Board was in error in concluding that the Applicant is a bargaining agent "that, according to established trade union practice in the construction industry, represents employees who commonly bargain separately and apart from other employees". It is submitted that the definition in *Section 137(1)(a)* is entirely different than the definition of a "trade union" in *Section 117(f)* and that the Board erred in concluding (in paragraph 30



of its decision) that the two sections have “the same purpose and effect”. If that were so, then, why are there two separate and distinct definition sections?

The evidence before the Board was that the United Brotherhood and its locals had a practice of representing not only carpenters and millwrights, but also construction labourers. In evidence before the Board were:

- (a) thirty-six (36) certificates issued by the Board since 1971 to the United Brotherhood which covered construction labourers;
- (b) two (2) certificates issued to Local 1669 and one (1) to Local 446 covering construction labourers;
- (c) eighteen (18) certificates issued by the Board since 1971 to Lumber and Sawmill Workers Union, Local 2693 (another local chartered by the United Brotherhood) covering construction labourers;
- (d) Local 2693’s collective agreement with the General Contractors’ Division of The Construction Association of Thunder Bay Inc. binding seventeen (17) employers and covering construction labourers.

It is, therefore, submitted that the Board is in error in concluding as it did in paragraph 31 of its decision that the Applicant is a trade union that according to established trade union practice represents employees in the construction industry who bargain separately and apart from other employees (carpenters and millwrights). This finding flies in the face of the evidence that the Applicant was not chartered, nor had any history, nor any intention of representing carpenters in the I.C.I. sector of the construction industry.

Local 2693 is a case in point. it clearly is a trade union pertaining to the construction industry within the meaning of *Section 117(f)*. However, since the introduction of provincial bargaining, it has not been regarded as an affiliated bargaining agent for carpenters since it has represented and continues to represent construction labourers.

In paragraph 32 of its decision, the Board concludes that the Applicant, while not covered by the Carpenters’ designation order, is covered by the Millwrights’ designation order. No evidence or submissions were made before the Board on this point. Millwrights are clearly a subdivision of the carpentry trade. The Carpenters Employee Bargaining Agency designation refers to “carpenters other than millwrights”. This reference would be unnecessary if a millwright was not a subdivision of the carpentry trade. Since the Applicant was chartered to exclude carpenters in the I.C.I. sector of the construction industry, it is submitted that such exclusion would

also cover millwrights. There was no evidence that the Applicant was chartered or intended to ever represent millwrights.

Since the Applicant is not represented by a designated employee bargaining agency (either the Carpenters or the Millwright Employee Bargaining Agencies), it is submitted that it is entitled to apply under *Section 144(5)* of the Act. The Applicant is in no different position than Lumber and Sawmill Workers' Union, Local 2693: a local chartered by the United Brotherhood which is not represented by an employee bargaining agency and which represents construction labourers. This comparison is one heavily relied upon by the Applicant in its submissions before the Board and yet no reference is made to this in the Board's decision.

The Board, in paragraph 37 of its decision, found that even if the Applicant was not represented by a designated employee bargaining agency, the result would be the same. This conclusion is still based on the conclusion that the Applicant is an affiliated bargaining agent, which we have dealt with earlier. In addition, the offence created by *Section 146(2)* it is submitted must be read in the context of what constitutes a "provincial agreement" as defined in *Section 137(e)* of the Act. A provincial agreement is binding on an affiliated bargaining agent but only where it is represented by the employee bargaining agency. The concept of an affiliated bargaining agent has no meaning except to the extent that it is represented by a designated bargaining agency and is covered by the provincial bargaining regime.

The result of the Board's decision is that the employees who have indicated a desire to be represented by the Applicant are denied the freedom to join the trade union of their choice. The effect of the Board's decision is that they can only be represented by the Labourers' Union, or possibly the Christian Labour Association of Canada or the National Council of Canadian Labour. It is submitted that this result runs counter to the freedom guaranteed by *Section 3* of the Act.

Finally, in paragraphs 41 and 42, the Board expresses another "concern" with respect to an issue the Board indicated at the hearing it was not going to deal with at this point in time. We note there is no evidence before the Board that there were unrepresented carpenters employed by any of the employers on the dates of application. Indeed, we believe the facts to be that any carpenters were represented on the application dates.

Based on the foregoing, we respectfully request that the Board reconsider and revoke its March 17, 1983 decision in these matters.

3. Counsel's letter was sent to the other parties for their comments. Replies were received from the respondent S. R. Lentz Construction Incorporated (Board File No.

0374-82-R) and from counsel for the interveners. The respondent opposes the request for reconsideration but on grounds different from those raised in the request. The text of the response from counsel for the interveners is set out below:

We are in receipt of the Board's letter dated April 7, 1983 enclosing counsel's Request for Reconsideration dated April 5, 1983.

We wish to respond to the Request for Reconsideration as follows:

1. The Decision of the Board over-rules its earlier Decisions in *Richard D. Steel Construction (1979) Ltd.* O.L.R.B. File No. 0023-82-R and *Ottawa Door Consultants Ltd.*, O.L.R.B. File No. 0044-82-R insofar as the Board determined in those cases that Carpenters' Local 1030 could represent an appropriate bargaining unit consisting of construction labourers in the industrial, commercial and institutional sector of the construction industry;
2. All aspects of the evidence and the grounds for the Decision including the application of the designations, were fully argued before the Board and in no respect was the Applicant denied an opportunity to make submissions;
3. The Board's Decision is not an erroneous interpretation of its enabling statute and clearly draws the distinction between the freedom of employees to join the trade union of their choice and the ability of certain trade unions to represent appropriate bargaining units in industrial, commercial and institutional sector of the construction industry in view of status as an affiliated bargaining agent.

In particular, the entire argument contained on pages 2, 3, 4 and 5 was exhaustively argued and expressly rejected by the Board in the course of the Decision. We wish to specifically refer to the fact that Carpenters' Local 2693, Lumber and Sawmill Workers, escapes from the Carpenters' Provincial Designation by virtue of its existence prior to the date of designation. Carpenters' Local 2693 is not listed as an affiliated bargaining agent on the face of the Carpenters' Designation and further does not fall within the "basket" clause which only covers local to be chartered subsequent to the issuance of the designation. The question remains open as to whether Carpenters' Local 2693 is an affiliated bargaining agent by virtue of the definition of same contained within Section 137(1)(a). Specifically, Carpenters' Local 2693 does pertain to the construction industry and represents employees who commonly bargain separate and apart from other employees namely construction labourers and of course is subordinate or directly related to the United Brotherhood of Carpenters and Joiners of America. We trust that this issue in relation to Local 2693 will arise before the Ontario Labour Relations Board in the near future.

We respectfully request that the Board ought to dismiss this Request for Reconsideration in view of the fact that the parties were afforded a full and fair hearing and no new evidence which could have been obtained with reasonable diligence and would have a material or determining effect on the decision of the Board is now available. The Interveners are entitled to rely upon the decisions of the Board in the knowledge that they are final and conclusive. The Board should not permit the Applicant to re-argue the merits of its case (see *Lorain Products (Canada) Ltd.* [1978] O.L.R.B. Rep. Mar. 262 at 263; *Ottawa Journal* [1977] O.L.R.B. Rep. Sept. 549; *Detroit River Construction Ltd.* 63 C.L.L.C. 16,260).

4. The principal findings of fact in the decision were that Local 1030, a newly chartered local union of the United Brotherhood of Carpenters and Joiners of America ("the United Brotherhood"), was an affiliated bargaining agent of the United Brotherhood within the meaning of section 137(1)(a) of the Act and that it was an affiliated bargaining agent represented by the Millwright District Council of Ontario of the United Brotherhood of Carpenters and Joiners of America and the United Brotherhood of Carpenters and Joiners of America ("the millwrights employee bargaining agency") but was not represented by the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America ("the carpenters employee bargaining agency"). Having found Local 1030 to be an affiliated bargaining agent represented by the millwrights employee bargaining agency, the Board concluded that:

- (a) if Local 1030 wishes to make applications for certification which relate to the ICI sector, as do these applications, it would have to bring them under section 144(1) of the Act and could not bring them under section 144(5), which it was seeking to do (see paragraph 33 of the decision);
- (b) for the reasons given in paragraphs 35 and 36 of the decision, these applications could not succeed under section 144(1) because a bargaining unit comprised of the construction labourers, cement finishers and waterproof applicators whom it was seeking to represent would not constitute an appropriate unit as prescribed by section 144(1); and
- (c) even were Local 1030 not represented by the millwrights employee bargaining agency and, therefore, eligible to bring an application under section 144(5) of the Act, the Board would not issue a certificate because Local 1030 would be prevented by section 146(2) of the Act from concluding a lawful collective agreement for the employees in question.

The key sections of the Act relative to those findings and conclusions are sections 137(1)(a) and 146(2), the sections which the Board is alleged to have interpreted incorrectly. Since the significance of Local 1030's claim that the Board considered grounds not argued before it in arriving at its decision largely rests on the Board's



interpretations of those sections, it will deal first with counsel's submissions with respect to those interpretations.

5. The Board agrees with counsel's statement that, if the Board has interpreted incorrectly the definition of affiliated bargaining agent in section 137(1)(a) of the Act, all of its reasoning which follows the finding that Local 1030 is an affiliated bargaining agent is also incorrect. The Board's finding that Local 1030 is an affiliated bargaining agent is the keystone of its decision. According to counsel, the Board made two errors in its interpretation.

6. Its first error was to conclude at paragraph 30 of its decision that sections 117(f) and 137(1)(a) have the same purpose and effect. That was not a conclusion reached by the Board. The Board had found in paragraph 29 that Local 1030 was a trade union that *according to established trade union practice* pertains to the construction industry, thus was a trade union within the meaning of clause (f) of section 117 of the Act. Since it was a new trade union without an established practice of its own, in order to make that finding, the Board relied on the established practice of the United Brotherhood, following the long-established policy described in paragraphs 27 and 28. Local 1030's newness posed a similar problem for the Board with respect to the definition of an affiliated bargaining agent in section 137(1)(a); that is, the requirement that an affiliated bargaining agent be a trade union that "... *according to established trade union practice* in the construction industry, ...." represents employees who commonly bargain separately and apart from other employees. It went on to observe that the use of the emphasized phrase in the definition of an affiliated bargaining agent had the same purpose and effect as the use of the phrase "... *according to established trade union practice* ..." in clause (f) of section 117. The Board concluded that, having been prepared to rely on the established practice of the United Brotherhood, in the absence of any established practice of Local 1030, to find pursuant to clause (f) of section 117 that Local 1030 was a trade union which pertains to the construction industry, it was reasonable for the Board to take the same approach in interpreting the phrase "... *according to established trade union practice* ....," used in section 137(1)(a); that is, examine and rely on the established practice of the parent trade union when the local is a new trade union with no practice of its own. Local 1030 is a newly chartered trade union without any evidence before the Board of it having an established practice of its own. Since it has been chartered to represent employees in the construction industry, however, and having regard for the fact that the United Brotherhood is a trade union that, according to established trade union practice in the construction industry, represents carpenters and millwrights, employees who commonly bargain separately and apart from other employees, the Board concluded that Local 1030 is also a trade union which represents carpenters and millwrights who are employees in the construction industry who commonly bargain separately and apart from other employees.

7. That conclusion, according to applicant counsel, was the Board's second error with respect to its interpretation of section 137(1)(a), since it was made in the face of Local 1030's evidence that it "... was not chartered, nor had any history, nor any intention of representing carpenters in the I.C.I. sector of the construction industry". Furthermore, it was made in the face of evidence that the Board had issued 36 certificates covering construction labourers to the United Brotherhood since 1971, two to its Local 1669, one to its Local 446 and 18 to its Lumber and Sawmill Workers Union, Local 2693, which union

has a collective agreement with the General Contractors Division of The Construction Association of Thunder Bay binding 17 employers and covering construction labourers.

8. The Board disagrees with counsel's argument that the Board was ignoring the evidence that Local 1030 "... was not chartered, nor had any intention of representing carpenters in the I.C.I. sector ...". The Board accepted in paragraph 22 the special conditions stipulated by William Konyha, the United Brotherhood's general president, which, *inter alia*, exclude Local 1030 from representing carpenters in the ICI sector. Furthermore it relied on that exclusion to find in paragraph 32 that Local 1030 was not captured by the "basket clause" of the carpenters employee bargaining agency designation. Neither of those findings required the Board to look behind Local 1030's chartering conditions or its constitution to the practice of Local 1030 or its parent. As the Board observed at paragraph 27 and 28 of the decision, the wording of clause (f) of section 117 of the Act requires more of the Board than simple reliance on the objects contained in an applicant's constitution in order to decide whether it is a trade union which pertains to the construction industry. The wording of the section requires the Board to see if those objects are sustained by an established practice, either of the applicant or the trade union which chartered it. Since Local 1030 was a newly chartered trade union, the Board accepted the established practice of its parent, the United Brotherhood. The wording of section 137(1)(a) also requires the Board to look beyond the chartering conditions and constitution of Local 1030 because of its reference to "... established trade union practice in the construction industry ...;". The Board took into account again the established practice of the United Brotherhood because Local 1030 was newly chartered and there was no evidence before the Board of any practice of its own. The Board found that the United Brotherhood satisfies the established practice requirement of section 137(1)(a). The request for reconsideration does not deny that fact. Based on that finding and on the evidence that Local 1030 had been chartered to organize and represent employees in the construction industry, the Board found it to be a trade union that represents employees in the construction industry (in other words carpenters and millwrights) who commonly bargain separately and apart from other employees and, therefore, was an affiliated bargaining agent of the United Brotherhood.

9. The Board's conclusion is not inconsistent with the express limitation on Local 1030 representing carpenters. That limitation extends only to carpenters in the ICI sector, not to carpenters in any other sector of the construction industry. While the province-wide bargaining part of the Act deals only with bargaining in the ICI sector, affiliated bargaining agents are not limited to representing employees in that sector. This is clear from the absence from the definition of any reference to the ICI sector together with the express reference in the definition of a provincial agreement in clause (e) of section 137 as being binding on "... the employees represented by the affiliated bargaining agents *and employed in the [ICI] sector of the construction industry ...*", a reference which would be superfluous if affiliated bargaining agents could only hold and exercise representation rights in the ICI sector. Moreover, the appropriate bargaining unit prescribed by section 144(1) clearly contemplates that they could represent employees in all other sectors.

10. Nor is the Board's conclusion inconsistent with the evidence that the United Brotherhood and some of its locals have been certified to represent construction labourers. The certificates referred to were issued prior to the existence in the Act of the

province-wide bargaining part, so there was no affiliated bargaining agent definition in the Act. The Board only had to satisfy itself that they were trade unions which pertained to the construction industry within the meaning of what is now section 117(f) of the Act. The fact that they were certified to represent construction labourers does not determine the question of whether they are affiliated bargaining agents. Were the Board to accept this argument, it would have to conclude from that same evidence that the United Brotherhood and its Locals 446 and 1669 were not affiliated bargaining agents, notwithstanding the fact that they are named in the Minister's designation of the carpenters employee bargaining agency as affiliated bargaining agents represented by that agency. Since there has been no challenge to them being included in the designation, it has not been necessary for the Board to decide whether they are affiliated bargaining agents within the meaning of section 137(1)(a). Certainly Local 1030 is not challenging their status. Conversely, Lumber and Sawmill Workers Union, Local 2693 ("Local 2693") is not one of the locals of the United Brotherhood named either in the carpenters or the millwrights designations; but that does not mean that it is not an affiliated bargaining agent of the United Brotherhood. The fact that it has not been named as an affiliated bargaining agent in any designation of an employee bargaining agency is not determinative of the question.

11. If the mere exclusion of an affiliated bargaining agent from the bargaining unit described in a designation order had the effect of determining affiliated bargaining agent status, there would seem to be no need for the powers granted to the Minister by section 139(2) of the Act which provides:

Where affiliated bargaining agents that are subordinate or directly related to different provincial, national or international trade unions bargain as a council of trade unions with a single employer bargaining agency for a province-wide collective agreement, the Minister may exclude such bargaining relationships from the designations made under subsection (1), and subsection 146(2) shall not apply to such exclusion.

A simple statement in the order excluding the particular bargaining agent from it would suffice. Similarly, if, as counsel for Local 1030 contends, "The concept of an affiliated bargaining agent has no meaning except to the extent that it is represented by a designated bargaining agency and is covered by the provincial bargaining regime," there would be no need for the express powers conferred by section 139(2) on the Minister to exclude from a designation order certain bargaining relationships of affiliated bargaining agents and to exclude those affiliated bargaining agents from application of section 146(2) of the Act. The presence in the Act of section 139(2) supports a conclusion that a decision whether to include a particular local of an employee bargaining agency in the bargaining unit description of the designation order neither deprives the local of the benefits or excludes it from the limitations of affiliated bargaining agent status if otherwise it satisfies the definition of an affiliated bargaining agent in section 137(1) of the Act. The issue of whether a local trade union which had not been included in the designation order to which its parent organization was a party was before the Board in *Diversified Sheet Metal Limited*, [1981] OLRB Rep. Nov. 1575. Sheet Metal Workers Association Local Union No. 285 was not named in the Minister's designation of the sheet metal workers employee bargaining agency, but when the issue of whether it was an



affiliated bargaining agent came before the Board, the Board found that it was an affiliated bargaining agent of the Sheet Metal Workers Association within the meaning of the Act, notwithstanding the absence of Local 285 from the designation order.

12. It is the Board's view, therefore, that it has construed correctly the definition of an affiliated bargaining agent in section 137(1)(a) of the Act. Accordingly, the Board confirms its finding in paragraph 32 of its decision that Local 1030 is an affiliated bargaining agent within the meaning of that section.

13. The other section of the Act which counsel for Local 1030 contends has been misconstrued by the Board is section 146(2). Counsel submits that "... the offence created by Section 146(2) ... must be read in the context of what constitutes a 'provincial agreement' as defined in *Section 137(e)* of the Act.". Counsel submits further that a provincial agreement is binding on an affiliated bargaining agent only if it is represented by an employee bargaining agency and that the concept of an affiliated bargaining agent has no meaning except to the extent that it is represented by a designated bargaining agency and is covered by the provincial bargaining regime. Nowhere in the Board's decision does it say that a provincial agreement is binding on an affiliated bargaining agent which is not represented by a designated employee bargaining agency. Nor can it be construed to say that. The Board presumes that counsel is saying that an affiliated bargaining agent *not* represented by an employee bargaining agency is not affected by the express prohibition in section 146(2) against bargaining for, attempting to bargain for or concluding any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement. The Board found that this prohibition applied to Local 1030 because it is an affiliated bargaining agent. We disagree with counsel's conclusion and, as stated in paragraph 11 above, we disagree with his conception that an affiliated bargaining agent only has meaning if it is represented by an employee bargaining agency and is bound by a provincial agreement. The Board's construction in paragraph 37 of the decision of section 146(2) and its conclusion that the express prohibition of the section applies to an affiliated bargaining agent whether or not it is represented by an employee bargaining agent is consistent with a similar conclusion reached at paragraph 7 of its decision in *Diversified Sheet Metal, supra*. In that case, the Board, having found that the applicant was an affiliated bargaining agent, although not represented by an employee bargaining agency, went on to find that "Although the local is not included in the designation [of the sheet metal workers employee bargaining agency], that fact does not exempt it from the strictures of section 146(2) and section 145(1) ...". The Board then quoted verbatim those sections emphasizing the phrase "... affecting employees represented by affiliated bargaining agents ..." in section 146(2) and the phrases "... in respect of employees employed in the [ICI] sector ..." and "... represented by affiliated bargaining agents ..." in section 145(1). The Board concluded by stating that "These sections clearly apply to employees represented by affiliated bargaining agents and employed in the [ICI] sector of the construction industry."

14. The Board finds other support for the conclusion that the express prohibition of section 146(2) applies to an affiliated bargaining agent whether or not it is represented by a designated employee bargaining agency. The definition of affiliated bargaining agent contains no reference to representation by an employee bargaining agency and, as noted at paragraph 9 above, no reference to the ICI sector. The term affiliated bargaining agent is used in many sections of the province-wide bargaining part of the Act sometimes



modified by reference to representation by an employee bargaining agency or representation of employees employed in the ICI sector and other times absent such modification. In the Board's view, this reflects the fact that many affiliated bargaining agents represent employees in sectors other than ICI, a fact which is a matter of Board record. Finally, as stated in paragraph 11 above, there would be no need for the Minister to have the express power to exclude from the requirements of section 146(2) affiliated bargaining agents which have been excluded from designation orders with respect to certain of the affiliated bargaining agents' bargaining relationships if counsel's conclusion was correct.

15. Accordingly, the Board is satisfied that it construed correctly section 146(2) of the Act when, at paragraph 37 of its decision, it concluded that the section would be a bar to Local 1030 concluding a lawful collective agreement with respect to employees in the ICI sector. Therefore the Board reaffirms its finding that Local 1030 cannot make a lawful agreement with respect to employees in the ICI sector.

16. One of the effects of these interpretations of section 137(1)(a) and 146(2) of the Act, counsel for Local 1030 contends, is to deny the employees who are seeking to have Local 1030 represent them the freedom to join a trade union of their choice and that this result runs counter to section 3 of the Act. The Board does not agree. The Board's decision does not limit or restrict the freedom of the employees, in the words of section 3, "... to join a trade union of [their] own choice and to participate in its lawful activities.". The Board's decision simply limits to a degree the ability of the union which they have joined to represent them in collective bargaining. In the Board's view, that limitation is no different than many of the other limitations contained in the Act which may be placed on a particular trade union's ability to represent employees in collective bargaining; for example, the Board's authority to determine appropriate bargaining units, the timeliness of representation applications and the exclusivity of bargaining agents. No one has suggested, nor can it be reasonably suggested, that these restrictions run counter to section 3. The Board is of the view that the province-wide bargaining regime created by the province-wide bargaining part of the Act is of a similar nature.

17. Clearly, the Legislature has created a regime of province-wide bargaining in the ICI sector of the construction industry and the Minister, pursuant to his authority under that part of the Act, has identified the kinds of trade unions which are to have access to that regime and be governed by it, that is, the designated employee bargaining agencies and their affiliated bargaining agents. They receive its benefits, such as province-wide recognition in the ICI sector as exclusive bargaining agents for their members employed in the trades for which those unions have been designated. Those trade unions are also affected by the regime's limitations on their bargaining, such as the limitation with respect to agreements or other arrangements imposed by section 146(2) or the limitations under sections 144(1) and 144(4) with respect to how they are to obtain bargaining rights in the ICI sector. Trade unions not captured by those designation orders and which are not affiliated bargaining agents are still free to represent employees in the ICI sector and other sectors pursuant to the provisions of section 144(5). Prior to the advent of the province-wide bargaining part of the Act, employees' choices of a bargaining agent affected whether they would be represented in collective bargaining under the construction industry provisions of the Act. For example, their choice of a trade union would determine whether their applications for certification would be processed under

the construction industry provisions of the Act and whether they would be entitled to a craft-type bargaining unit. If they wished to have their application processed under the construction industry provisions, they had to select a trade union which pertains to the construction industry. If they wished to have a craft-type bargaining unit, they had to select a trade union which could satisfy the requirements of section 6(3) of the Act, or at least had been found by the Board to be a trade union which was entitled to a bargaining unit defined in terms of its trade, like the International Union of Operating Engineers or the Labourers International Union of North America. The addition of the province-wide bargaining part of the Act simply has had the effect of altering the range of choices for employees who work in the ICI sector. If they wish to be part of the province-wide bargaining regime, they must select a union which is designated for their trade for that purpose. If they do not wish to be part of the province-wide bargaining regime, they must select a trade union which is not part of it.

18. The Board turns now to the claim that it erred in concluding that Local 1030 is covered by the millwrights designation order. Counsel asserts that the prohibition on Local 1030 with respect to carpenters in the ICI sector included millwrights because millwrighting is a subdivision of the carpentry trade. Counsel further asserts that there was no evidence that Local 1030 was chartered or intended to ever represent millwrights. The latter assertion only holds true if the carpenter exclusion incorporates millwrights. The evidence before the Board is that the charter received by Local 1030 was identical to the charters issued to all locals of the United Brotherhood and is without reference to the trade or geographic jurisdiction granted to Local 1030. Therefore such jurisdiction would issue from the constitutions of the United Brotherhood and Local 1030, subject to the modifying terms of general president Konyha's letter granting the charter. See paragraphs 9, 10 and 11 of the Board's decision. The trade jurisdiction in the constitutions would be that of the carpenter and joiner trade in all of its divisions and subdivisions. Therefore if the trade jurisdiction described by Konyha's letter does not have the effect of excluding millwrights, they are included within the scope of Local 1030's charter.

19. Counsel points to the fact that the designation of the carpenters employee bargaining agency excludes millwrights by the phrase "carpenters other than millwrights" and argues that there would be no need to do so if millwrighting was not a subdivision of the carpentry trade. The fact that the Minister has excluded millwrights from the carpenters employee bargaining agency designation is neither a finding that millwrighting is part of the carpentry trade nor that carpentry and millwrighting are two separate trades. It is simply recognition of what was the bargaining pattern in the ICI sector at the time the designations were made. That circumstance is reflected in the Board's record. It is a matter of Board record that eight locals of the United Brotherhood have certificates of status on file with the Board as trade unions within the meaning of section 1(1)(p) of the Act. They also have status as trade unions which pertain to the construction industry within the meaning of section 117(f) of the Act and are craft trade unions within the meaning of section 6(3) of the Act which, when they apply for certification, entitles them to seek a craft unit of millwrights and apprentices. The Millwright District Council of Ontario, which is joined with the United Brotherhood in the Minister's designation to form the millwrights employee bargaining agency, has been certified by the Board under section 10 of the Act as a certified council of trade unions to represent those eight locals in collective bargaining without reference to sector, in other words, across all sectors of the construction industry, with the exception of one local for which the Council can

bargain in the ICI sector only. It is also a matter of Board record that the Millwright District Council of Ontario has its counterpart in other Carpenters District Councils which have been certified by the Board as certified councils of trade unions to represent in collective bargaining, without, reference to sector, other locals of the United Brotherhood which have bargaining rights for units of carpenters and carpenters' apprentices. The Board's consistent practice over many years has been to grant to the United Brotherhood, its certified district councils and its locals bargaining units described in terms either of carpenters or millwrights. It is patently clear therefore, no matter how the constitutions refer to millwrights, the Board has recognized carpenters and millwrights as distinct crafts under section 6(3) of the Act. The Board's interpretation of the limitation in Local 1030's charter is entirely consistent with that distinction of carpenters and millwrights as separate crafts.

20. Even if the Board has erred by not according to the term "carpenter", as used in Konyha's letter granting the charter to Local 1030, the broader meaning counsel claims for it under the United Brotherhood's constitution, it would still find Local 1030 to be captured by the basket clause of the millwrights designation. The admitted purpose of the charter limitation was to create Local 1030 as a trade union to be in no different position than Lumber and Sawmill Workers' Union, Local 2693, with the intent that it be a trade union with access to section 144(5) of the Act. In order to achieve this purpose, it was deemed necessary to charter it in such a way as to avoid being swept in by existing designations affecting newly chartered locals of the United Brotherhood, of which there were two, the carpenters and the millwrights. Since the formal charters issued to new locals contain no reference to their trade jurisdiction, the Board has to rely on supporting documents, such as Konyha's letter in the instant case, to determine that jurisdiction. The designation orders distinguish carpenters and millwrights and Konyha's letter does not. In the absence of any clear exemption of millwrights in the ICI sector from Local 1030's charter jurisdiction, the Board presumed that they were free to represent millwrights and, therefore, were captured by the basket clause of the millwrights designation. This is a reasonable presumption, particularly in light of the sweeping nature of the inclusive description of Local 1030's jurisdiction with respect to "other construction workers".

21. The parallel which counsel drew in the hearings between Local 1030 and Lumber and Sawmill Workers' Union, Local 2693, and reiterated in the request for reconsideration, is of no assistance to his claim that Local 1030 should have access under section 144(5) of the Act. Since the coming into force of the province-wide bargaining part of the Act, Local 2693 has not had to determine its status under section 144 or to determine whether it is affected by the strictures of section 146(2) of the Act. While it would certainly qualify as a trade union which, on the strength of its own practice, pertains to the construction industry within the meaning of section 117(f) of the Act, that same practice would not likely satisfy the requirement of section 137(1)(a) of being "... a bargaining agent that, *according to established trade union practice in the construction industry*, represents employees who commonly bargain separately and apart from other employees ...". There is no assertion that Local 2693 bargains separately and apart for carpenters according to established trade union practice in the construction industry, and, if in fact it does not, it was properly excluded from the Minister's designation order for carpenters. The collective agreement between Local 2693 and The Construction Association of Thunder Bay Inc., on which counsel relies does not purport to cover carpenters, but it does purport to cover classifications other than construction labourers



such as truck drivers, operators of cranes, shovels and other equipment, mechanics and welders. If in fact Local 2693 represents those classifications together with construction labourers, it is not reasonable to say that it bargains separately and apart for construction labourers. In fact, the established practice in the construction industry with respect to crane and shovel operators, for example, and persons primarily engaged in the maintenance of such equipment, is for the International Union of Operating Engineers to represent them in collective bargaining. In such circumstances, Local 2693 is not likely to satisfy the first requirement of the affiliated bargaining agent definition in section 137(1)(a) of the Act and is not likely an affiliated bargaining agent.

22. Furthermore, with respect to construction labourers, the established trade union practice in the construction industry is for them to be represented in collective bargaining by the Labourers' International Union of North America and the designation order for construction labourers was made to that international union. Since that order covers only affiliated bargaining agents of the Labourers International Union of North America, Local 2693 would not be included in it. Not having been included in the designation order for carpenters or labourers (or for that matter, for any other trade), Local 2693 would not be represented by a designated employee bargaining agency, would be outside of the provincial bargaining regime and would not have access to the carpenters provincial agreement or that of any other trade. If it is not an affiliated bargaining agent, it would not be subject to the prohibition in section 146(2) against concluding any collective agreement or other arrangement than the provincial agreement in respect of employees in the ICI sector. Since it would have access to section 144(5) of the Act and also could conclude a lawful collective agreement covering employees in the ICI sector, it would be free to represent ICI employees in any bargaining unit found by the Board to be appropriate for collective bargaining. In that respect, it would differ from a trade union like Local 285 of the Sheet Metal Workers Association in *Diversified Sheet Metal*, *supra*. While Local 285 had not been included in the sheet metal workers designation order and, therefore, was outside of the provincial bargaining regime, it was precluded by section 146(2) from being able to conclude a lawful collective agreement for the sheet metal workers employed in the ICI sector whom it was seeking to represent. The Board declined, therefore, to process Local 285's application for certification under section 144(5) even though it was entitled to apply under that section.

23. The request for reconsideration does not make it clear whether the millwrights designation order is one of the grounds which Local 1030 claims was not argued before the Board. The millwrights designation is one of two to which the United Brotherhood is a party. The designation is not only a matter of Board record, but the United Brotherhood is one of the parties to which it was issued and under which it has performed as an employee bargaining agency jointly with its Millwrights District Council of Ontario. Therefore, it must have been patently obvious to Local 1030 that any question of whether it was an affiliated bargaining agent of the United Brotherhood and whether it was represented by a designated employee bargaining agency would involve both the carpenters and the millwrights designations. For whatever reason it chose not to deal with the millwrights designation, it must now accept the consequences.

24. The request for reconsideration correctly states that the Board's decision is contrary to its earlier decisions in *Richard D. Steele Construction (1979) Ltd.*, Board File No 0023-82-R which issued April 29th, 1982 and *Ottawa Door Consultants Ltd.*, Board



File No. 0044-82-R which issued May 17th, 1982, both unreported. As the Board noted at paragraph 6 of its decision, however, those decisions, in which Local 1030 was granted certification, were issued without a hearing. Therefore, when the Board made the necessary finding that Local 1030 was not an affiliated bargaining agent, it did so absent any argument that Local 1030 was an affiliated bargaining agent. The interveners in the instant applications have raised that issue. Therefore the issue was properly before the Board and it was necessary for the Board to exercise its jurisdiction, deal with it afresh and determine Local 1030's status in that respect. It would have been a failure of jurisdiction not to do so.

25. The Board turns finally to the reference in the last paragraph of counsel's request about paragraphs 41 and 42. These paragraphs simply express the Board's concern about the potential for conflict between the Board's policy for determining and describing appropriate bargaining units in the construction industry and Local 1030's inability to represent carpenters in the ICI sector. Since there was no evidence of carpenters being employed by any of the respondents on the date when these applications were made, bargaining units described in terms of all unrepresented trades might be appropriate. On the other hand, in circumstances where unrepresented carpenters were employed, bargaining units described in those terms would not be appropriate. However, in the absence of evidence of carpenters being employed on the date of application, the decision contains no finding with respect to the presence of unrepresented carpenters. Therefore there is no need for Local 1030 to make argument on the subject matter of the two paragraphs.

26. In summary, the issue of whether Local 1030 is an affiliated bargaining agent of the United Brotherhood was properly before the Board in these applications notwithstanding the Board's two earlier decisions to the contrary. Therefore it was a necessary exercise of the Board's jurisdiction to decide that issue. The parties had full opportunity to present their evidence and make their representations thereon, including the opportunity to call evidence on the carpenters and millwrights employee bargaining agency designations, the two agencies to which the United Brotherhood is a party. The parties argued fully the issue of whether Local 1030 is an affiliated bargaining agent of the United Brotherhood and whether it was represented by the carpenters employee bargaining agency. The Board decided that issue, and the parallel one with respect to the millwrights designation, on the evidence before it and on a matter of Board record to which the United Brotherhood is a party. With respect to the Board's expression of concern in paragraphs 41 and 42 of the decision about a potential problem where there might be unrepresented carpenters employed, the Board made no finding that there were any with respect to these applications. Therefore, the Board has not based its decision in part either on grounds not argued before the Board or on grounds which the parties did not have full opportunity to argue. Nor has the Board erroneously interpreted its enabling statute, in particular, sections 137(1)(a) and 146(2) thereof and its interpretation does not have the result of depriving the employees of the freedoms contained in section 3 of the Act.

27. While it appears that one result of the Board's interpretation of those two sections is that a building trades union could not charter a new local which could operate in the ICI sector outside of the provincial bargaining scheme, that conclusion would be incorrect. No doubt a trade union newly chartered by an established building trades

union and therefore having no construction industry practice of its own would, if it sought certification under section 144 of the Act, encounter the same result as the applicant herein. That is, the Board would rely on the practice of its parent organization and sister locals in order to determine whether the new local was a trade union within the meaning of section 117(f) and an affiliated bargaining agent within the meaning of section 137(1)(a). In all likelihood, the evidence would lead to a positive finding in both instances. On the other hand, if the new local proceeded to obtain voluntary recognition from construction industry employers as bargaining agent for their employees in a variety of the building trades and, by so doing, build up a practice of its own of representing construction industry employees across a number of trades, it would be able on the strength of its own practice to satisfy section 117(f), but would fail to satisfy the first requirement of section 137(1)(a) of representing employees who, according to established trade union practice in the construction industry, commonly bargain separately and apart from other employees. Therefore it would be a trade union which pertains to the construction industry but would not be an affiliated bargaining agent and would be eligible to apply for certification under section 144(5) of the Act. In that event, the strictures of section 146(2) with respect to agreements or other arrangements covering employees in the ICI sector would not operate to prevent it from concluding a lawful collective agreement with respect to that sector.

28. The Board's experience demonstrates that such a result is attainable. In a somewhat analogous context, Local 183 of the Labourers' International Union of North America which customarily had been entitled to a construction industry bargaining unit described in terms of all construction labourers employed by the employer without the need to represent any other unrepresented trades employed by that employer at the time of an application for certification, by building a practice of representing employees across several trades employed by employers in residential concrete forming work, qualified in 1974 to be certified as bargaining agent for a bargaining unit of employees described in terms of "... all employees of the [employer] engaged in concrete forming on residential building projects ..." in the Board's geographic area #8. See *Peniche Construction Forming Ltd.*, [1974] OLRB Rep. 208. Local 183 was certified for such a unit in that case by demonstrating a practice of representing employees who worked as a crew exercising skills of more than one craft, with each member of the crew performing the work of its other members. The effect of that decision was to enable Local 183 to be certified for that type of unit regardless of whether the employer had at the time of the application employees in other trades falling outside of the unit who were not represented by any trade union. Thus Local 183, by its demonstrated practice, was able to bring itself outside of the Board's policy of not describing construction industry bargaining units in terms of "all employees". That policy deemed units described in terms of all employees of the employer not to be appropriate in the construction industry since such units created an opportunity for jurisdictional disputes between trade unions over work assignments. The Board had consistently applied that policy since its decisions in *A. K. Penner & Sons Ltd.*, [1966] OLRB Rep. Oct. 493 and *Winter and Son Limited*, [1966] OLRB Rep. Oct. 889. Those decisions served notice on construction industry employers and trade unions of that policy. See Practice Note 11 in the Board's Rules of Procedure, Regulations and Practice Notes, December 1981. See also the Board's decision in *Matterhorn Construction (Hamilton) Limited*, [1981] OLRB Rep. Sept. 1276 referred to in paragraph 41 of the decision under reconsideration here.

29. A newly chartered local of a non-building trades union, or for that matter an established local with no practice of representing employees in the construction industry, also would be able to be certified to represent employees employed in the ICI sector of the construction industry. Since, however, it would have no practice of its own and since its parent organization likely would not have a practice on which the new local could rely to make it a trade union pertaining to the construction industry within the meaning of section 117(f), it would have to apply for certification under the general provisions of the Act. Thus the employees whom it sought to represent would have to constitute a bargaining unit which could be found appropriate under section 6(1) of the Act. Normally this would be a unit described in terms of employees in all unrepresented trades employed by the employer within an appropriate municipality at the times material to the application. Once the local had developed a practice of its own which would enable a finding by the Board that it is a trade union which pertains to the construction industry pursuant to section 117(f), it would be entitled to apply for certification under section 144(5) of the Act. Its own practice would likely prevent the Board from finding that it was an affiliated bargaining agent, so it would be able to apply to represent employees employed in the ICI sector and it would not be affected by the strictures of section 146(2).

30. The Board is constrained not to conclude this decision without commenting on the obvious purpose of the chartering of Local 1030 as a new local. As the Board has already noted in paragraph 17 above, the province-wide bargaining part of the Act has brought to those trade unions which are part of that bargaining regime new benefits and new limitations. What the United Brotherhood is attempting to do is to enjoy all of the benefits of province-wide bargaining, while at the same time by its chartering of Local 1030, seeking to devise a vehicle which would enable the United Brotherhood to get outside of some of the regime's strictures, such as those imposed by sections 144(1) and 146(2). In other words, it is seeking to employ Local 1030 to enable the United Brotherhood to escape the reach and purpose of the province-wide bargaining part of the Act. The fact that there are already two locals of the United Brotherhood with geographic jurisdiction in the Ottawa area where Local 1030 is based serves to heighten the subterfuge at play here. The province-wide bargaining part of the Act was added to it by *The Labour Relations Amendment Act, 1977*, S.O. c.31 ("Bill 22"). The legislative purpose of that amendment was first to recognize existing bargaining rights and patterns in the ICI sector and then to structure around them a province-wide bargaining regime, the objective of which was to stabilize the collective bargaining process in this significant sector of the construction industry. It is wholly inconsistent with that objective and clearly not contemplated by the Legislature that these provisions be interpreted in a way which would generate major and fundamental instability in the collective bargaining process. In not permitting the United Brotherhood to escape the reach and purpose of the provincial bargaining regime by the technique of chartering a local which appears to satisfy the form of the province-wide bargaining part of the Act without due regard for its purpose, the Board is giving primacy to substance over form.

31. Having regard for all of the foregoing, the Board finds that the parties have had a full and fair hearing and the request for reconsideration contains neither any new evidence which previously, with due diligence, could not have been obtained nor any request to make representations not already considered by the Board. Furthermore, the request for reconsideration does not raise any other grounds which would cause the



Board to reconsider, vary or revoke its decision.

32. In the result, the Board is of the opinion that it should not reconsider, vary or revoke its decision which issued in these matters March 17, 1983 and the applicant's request is therefore denied.

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**2303-82-R; 2304-82-R** United Brotherhood of Carpenters and Joiners of America, Local 494, Applicant, v. **Metro Century Construction Ltd.** and Chartex Construction Ltd. and C. Mady Leaseholds Ltd., Respondents.

Related Employer - Sale of a Business - Former employee creating new corporation in same line of business as former employer - Acquiring some assets of former employer - Entities not related - No sale of business

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members J. Wilson and M. A. Ross.

***APPEARANCES:** David McKee and James Caron for the applicant; Roy C. Fillion, J. Slopen, C. Mady, D. McCulloch and C. Peterson for the respondents.*

**DECISION OF THE BOARD;** July 22, 1983

1. File No. 2303-82-R is an application under section 1(4) of the *Labour Relations Act*. Section 1(4) empowers the Board to treat two or more associated or related businesses that are being carried on under common direction or control as one employer for the purposes of the Act. File No. 2304-82-R is an application under section 63 of the Act. Section 63 provides that an employer who "buys" a "business", or part of a business, is bound by the same collective bargaining relationships as was the "vendor". The section also empowers the Board to decide whether or not a business has been sold.

2. These proceedings involve three separate corporate entities, namely: C. Mady Leaseholds Ltd. ("Leaseholds"), Metro Century Construction Ltd. ("Metro Century") and Chartex Construction Ltd. ("Chartex"). It is acknowledged that both Leaseholds and Metro Century are owned by, and under the ultimate direction of, Mr. Charles Mady. Mr. Mady has for a number of years been active in the real estate development field in the Windsor area.

3. At the time of the hearing into these proceedings, the offices of both Leaseholds and Metro Century were in the same building on Lauzon Road in Windsor. The building was owned by Joy-Cee Management Ltd., a firm owned by Mr. Mady's wife. On February 4, 1983 this building had been put up for sale with the idea that in May of 1983 the two firms would be moving to new facilities in Windsor.

4. Leaseholds was incorporated in July of 1977. The firm was originally incorporated to develop a large project known as Pickwick Place. Leaseholds subsequently sold Pickwick Place and in April of 1981 the firm was merged with Iringa Developments Ltd. another firm owned by Mr. Mady. The merged firm continued doing



business under the Leaseholds' name. Iringa Developments had previously been active in the real estate and development business, and Leaseholds continued in this field. Leaseholds (and before it Iringa Developments) frequently acted as an owner-client which contracted to have construction work done for it, but the company itself never became actively involved in the construction industry. The applicant trade union holds no bargaining rights with respect to Leaseholds.

5. Metro Century was incorporated in 1978 as a construction industry general contractor under Mr. Mady's control. This company entered into a contractual relationship with the applicant trade union. Until 1980 all of Metro Century's work was done for Leaseholds. However, in 1980 the volume of Leaseholds' development work began to decline and in consequence Metro Century began to do work for other owner-clients. One of these other owner-clients was Southland Canada Ltd. ("Southland") which was then constructing a series of "7-11" convenience stores in southern Ontario. Because of Southland's practice of owning, rather than leasing its stores, Leaseholds had no involvement with Southland.

6. Mr. Mady is the president and sole shareholder of Metro Century. The firm's vice-president and solicitor is Mr. Jeffrey Slopen. The day-to-day activities of the company are conducted under the direction of Mr. Jim Boscariol, who was described as the firm's construction co-ordinator. Prior to the fall of 1982, Mr. Boscariol had a number of individuals working under him including Mr. Mario Muscedere, a construction supervisor, and Mr. Daniel McCulloch, a draftsman and expeditor.

7. In 1982 Metro Century entered into contracts to build two large projects in Windsor for owner-clients other than Leaseholds. Mr. Slopen testified that both contracts proved to be "disastrous" for the company due to heavy cost over-runs. In the fall of 1982 liens of over one million dollars were registered against the two projects. To compound Metro Century's difficulties, its bank called in all of the company's loans. Faced with this situation the company returned all of the equipment which it had been leasing and auctioned off most of the equipment which it owned. The company also laid off most of its employees, including Mr. Muscedere and Mr. McCulloch.

8. At the time of the hearing, Metro Century had managed to discharge all of the liens registered against the two projects, but it still had outstanding unsecured debts of approximately \$250,000.00. Under the direction of Mr. Boscariol the company was finishing off the two projects with the expectation that once they were finished the company would be able to collect certain "hold backs" from the owner-clients. Given the company's precarious financial situation, it has not bid on any new work. At the hearing, counsel for the company indicated that notwithstanding the company's somewhat improved financial condition, the future of Metro Century still remained highly uncertain.

9. As already noted, one of the individuals laid off by Metro Century was Mr. Daniel McCulloch, a draftsman and expeditor. As part of his duties with Metro Century, Mr. McCulloch was responsible for lining up and dealing with various sub-contractors. Both Mr. McCulloch and Mr. Slopen testified that Mr. McCulloch had not been considered part of the management of Metro Century, and in this regard noted that he had been paid an annual salary of only \$18,000.00. Mr. McCulloch was given one month's

notice of lay-off on December 1, 1982. Shortly thereafter he decided to explore the possibility of establishing his own construction company. Lacking the necessary funds to establish such a company Mr. McCulloch entered into a partnership with a friend, Mr. Gary Dupuis, who was the manager of a grocery store. Because Mr. Dupuis had no construction industry background it was agreed that his role would be limited to providing the financial backing for the new company and assisting with its financial affairs.

10. Prior to actually incorporating a new company, Mr. McCulloch sought assurances that such a company would likely be able to obtain work. Early in December of 1982 Mr. McCulloch had discussions with a representative of Southland who agreed that Southland would be receptive to bids from a firm led by Mr. McCulloch. In his testimony, Mr. McCulloch acknowledged that Southland had come to know about him due to his employment with Metro Century. Mr. McCulloch also had a discussion with Mr. Mady, who indicated that Leaseholds would be willing to receive bids from a company led by Mr. McCulloch. Mr. McCulloch testified that he sought and received a similar favourable response from a local bulk warehouse firm, and that Mr. Dupuis received a similar response from the supermarket chain that employed him. Armed with these assurances, Mr. McCulloch arranged for the incorporation of Chartex.

11. Chartex was incorporated on December 24, 1982. The legal work connected with the firm's incorporation was handled by Mr. Slopen, who, in addition to his involvement with the various Mady companies, also carries on a law practice. Mr. McCulloch testified that he asked Mr. Slopen to do the legal work because he knew that Mr. Slopen was experienced in dealing with construction industry matters. Mr. Slopen billed Mr. McCulloch and Mr. Dupuis for his work. Reflecting Mr. Dupuis' financial commitment to the new firm, at the time of its incorporation he received 67 of its common shares compared to 33 received by Mr. McCulloch. Mr. McCulloch, as the person who would actually be directing the affairs of the company, was named its first president.

12. Chartex owns no major construction equipment although it did purchase some small tools from local suppliers. Chartex did not acquire any of the equipment which Metro Century sold by auction. Chartex did, however, obtain from Metro Century a drafting table and blueprint equipment for which it paid about \$10,000.00. By dealing with a local bank Chartex also obtained a lease on a pick-up truck which had formerly been leased by Metro Century.

13. At the time of the hearing Chartex was carrying on business out of Mr. McCulloch's home. The drafting table and blueprint equipment were still located at Metro Century's office on Lauzon Road, where Mr. Mady had agreed they could be kept until the end of May, 1983 when Metro Century would be moving. Mr. McCulloch testified that he was actively looking for another location to keep the equipment. According to McCulloch, at the time of the hearing he was putting in a regular work week of about 60 hours. He testified that he spent about 25 to 30 hours per week in "the field", 20 to 25 hours in his office at his home, and 15 to 20 hours at the Lauzon Road facility using the drafting table and blueprint equipment. In cross-examination Mr. McCulloch testified that he had met with certain sub-contractors at Metro Century's offices on Lauzon Road, but explained that he had done so in part because dealings with sub-contractors generally involve using the blueprint equipment.

14. Mr. McCulloch handles the administrative and bidding end of Chartex's operations, as well as arranging for sub-contractors. About 80 per cent of Chartex's work is sub-let. The firm's construction projects are run by Mr. Muscedere who Mr. McCulloch hired. It will be recalled that Mr. Muscedere was laid off by Metro Century at the same time as Mr. McCulloch. Mr. Muscedere was given a free hand in hiring any required construction employees. There is no evidence before us as to whether or not he hired former employees of Metro Century. To assist with its payroll administration, Chartex uses a firm called Zena Business Consulting. Mr. McCulloch testified that Zena did similar work for Metro Century but that to his knowledge Zena is not a "Mady company".

15. The union called as a witness Mr. James Caron its business representative. Mr. Caron testified that on one project he noticed Mr. Muscedere using a loader on which the Metro Century name had been painted over. Mr. Caron further testified that he asked Mr. Muscedere if the job in question was a Metro Century project, to which Mr. Muscedere had replied that in one way it was, and in one way it was not. For his part Mr. McCulloch testified that if Mr. Muscedere had used a loader it had been without his knowledge or approval, and further that he had several times reminded Mr. Muscedere that Chartex is a different company than Metro Century.

16. Chartex has been the general contractor on a number of different projects. Two of these projects were pursuant to contracts with Leaseholds. One contract, valued at about \$40,000.00 was for the renovation of both an ice-cream store and a convenience store. The other contract, valued at about \$80,000.00, was for the renovation of a convenience store. In both instances Chartex had received the work after agreeing to lower its original bid price. Chartex also put in a bid for a plaza being constructed by a firm 70 per cent owned by Leaseholds and 30 per cent by Mr. Slopen. Chartex's bid was higher than that of another firm and this other firm was awarded the contract. Chartex has bid on a number of projects not connected with Leaseholds. The company has been awarded a contract by Southland to build a 7-11 store, as well as a contract for \$97,000.00 from Malden Petroleums Ltd. to build a gas bar on the same site as one of Leaseholds renovation projects. At the time of the hearing the company was awaiting a response to certain other bids it had made.

17. During the hearing, the applicant trade union established that the building permit for the 7-11 store being built by Chartex had been taken out in the name of Leaseholds, and that the permit for the installation of the gas bar was in the name of Metro Century. Mr. McCulloch testified that he personally had taken out the building permit for the 7-11 store while in the employ of Metro Century. According to Mr. McCulloch, Metro Century had been asked as a favour by Southland to take out the permit, but in light of the liens registered against Metro Century he had decided to avoid any potential problems with the relevant municipal officials by taking out the permit in the name of Leaseholds. As for the gas bar, Mr. McCulloch testified that he thought that the permit had been taken out in the name of Metro Century because that firm was licensed to install gas facilities. As already noted, the gas bar was being installed on a Leaseholds' site.

18. In his final submission, counsel for the union indicated that given the facts involved, the union was not now seeking to bind Leaseholds to a collective agreement. Counsel indicated, however, that the union desired an order that would bind Chartex to



the agreement that Metro Century was bound to. In this regard counsel contended that Leaseholds and Metro Century had been carrying on a "composite business" and that the Metro Century part of this composite business had been sold to Chartex. In the alternative, counsel contended that Metro Century, Leaseholds and Chartex should be treated as a single employer for the purpose of the Act in that Chartex had been created to take the place of Metro Century after it had run into financial difficulties.

19. We propose to first deal with the allegation that there has been a sale from a "composite business" of Leaseholds and Metro Century to Chartex within the meaning of section 63 of the Act. The effect of section 63 to ensure that when a business, or part of a business, is disposed of, the purchaser acquires it subject to the collective bargaining obligations of the vendor. For the section to apply, however, a "business" or part of a business must have changed hands and not simply certain assets. As the Board noted in *The Charming Hostess Inc.* case [1982] OLRB Rep. April 536, the decision as to whether or not a business or part of a business has been transferred, as opposed only to certain assets, is often a difficult one:

"28. It is seldom very difficult to determine that a predecessor has disposed of "something", nor is it difficult to discern when a trade union's bargaining rights have been prejudicially affected. A more complex question, however, is whether the nature of the disposition and what is disposed of, bring the transaction within the scope of section 63. This requires an assessment of the transaction in its totality and a consideration of its labour relations (rather than commercial law) perspective. In addition to the continuity of the work or jobs (without that, a continuation of the collective bargaining relationship would make little sense) a number of other factors may be relevant to the successor rights issue. In *Culverhouse Foods Ltd.* [1976] OLRB Rep. Nov. 691, the Board listed some of these:

'In each case the decisive question is whether or not there is a continuation of the business...the cases offer a countless variety of factors which might assist the Board in its analysis: among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these



possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was.'

If many of the elements that made up the predecessor's business organization can be found in the hands of the successor, and are used for the same business purposes, there is usually a strong inference that there has been a "sale of a business" to which section 63 should apply. If, on the other hand, the alleged successor has its own established business organization by which it services the predecessor's customers, the inference may be otherwise – even if it has acquired some assets or other incidental elements which might be traced to the predecessor. (See also *Kenmir v. Frizzel et al.*, [1968] 1 All E.R. 414, and *R. v. B.C. Labour Relations Board Ex parte. Lodum Holdings Limited* (1969), 3 DLR (3d) 41.)"

20. In the instant case the only assets of Metro Century that were transferred to Chartex were a drafting table and blueprint equipment. Chartex has not acquired the facilities, construction equipment or name of Metro Century. On these facts, we are led to conclude that Mr. McCulloch, with the financial backing of Mr. Dupuis, established a new business and that Chartex did not acquire either the business of Metro Century, or part of the business of a "composite" of Leaseholds and Metro Century. Accordingly, we are satisfied that the application under section 63 of the Act cannot succeed.

21. This then leaves the application under section 1(4) of the Act. As noted earlier this section empowers the Board to declare two firms under common direction and control to be a single employer. The union contends that given the facts present here, and in particular Mr. McCulloch's involvement with both Metro Century and Chartex, a section 1(4) declaration would be appropriate. In the *Brant Erecting and Hoisting* case [1980] OLRB Rep. July 945, the Board recognized that in the construction industry a single individual may well be central to a firm's operation. In that case the "key figure" in one company that had suffered certain financial reverses established a new company under his control. Due to the fact that the same individual had been "key" to both companies, the Board concluded that section 1(4) of the Act should apply to bind the new company to the bargaining rights applicable to the earlier company. The facts of the instant case, however, are much different. Mr. McCulloch was neither the owner nor the "controlling force" behind Metro Century. The experience he acquired at Metro Century, and the contacts he made while there, have doubtless proved to be of assistance to him at Chartex. However, the mere fact that an individual on forming his own company has certain advantages due to his experience with a previous employer does not by itself result in the two companies being under common direction or control. Accordingly, we do not believe a section 1(4) declaration to be appropriate simply on the basis of Mr. McCulloch's earlier employment with Metro Century.

22. As an alternative position, the union contends that there exists a functional interdependence between Leaseholds and Chartex and that through this interdependence Leaseholds in fact exercises control over Chartex. The Board has recognized that two nominally independent employers may in certain circumstances be so functionally and

economically integrated as to in reality be under common direction and control and appropriately treated as one employer. See: *J. H. Normick Inc.* [1979] OLRB Rep. Dec. 1176. Certain facts in the instant case do suggest a close relationship between Chartex on the one hand and Leaseholds and its sister company Metro Century on the other. These facts include Chartex's acquisition of two large contracts from Leaseholds which in the past would likely have been awarded to Metro Century, Mr. Muscedere's operation of a Metro Century loader and the way the permits for certain of Chartex's jobs were acquired. Certain other considerations, however, suggest that Chartex is not so interrelated with Leaseholds as to be under its control. In particular, it is clear that Chartex has acquired work from firms other than Leaseholds and that it has placed bids on other non-Leaseholds projects. The evidence also establishes that Chartex sought, but failed, to obtain the contract for a project being built by a company 70 per cent owned by Leaseholds and 30 per cent owned by the Vice-President of Leaseholds. Taking this evidence as a whole, we are, on balance, led to the conclusion that Chartex is not so functionally integrated with Leaseholds as to justify the Board making a section 1(4) declaration.

23. Having regard to the above, both of these applications are hereby dismissed.

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**0409-83-M National Elevator and Escalator Association, Employer, v. International Union of Elevator Constructors, Local 96, Trade Union**

**Arbitration - Construction Industry Grievance - Practice and Procedure - Reference - Union requesting arbitration under s.45 - Employer subsequently referring same grievance to Board under s.124 - Union and employer both entitled to make respective applications - Board having jurisdiction since s.45 jurisdiction not yet established at time of referral under s.124**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members J. Murray and W. F. Rutherford.

**APPEARANCES:** *M. Patrick Moran, A. Reistetter and H. Richards for the Employer; David Jewitt and Bill Morran for the Trade Union.*

**DECISION OF THE BOARD;** July 21, 1983

1. This is a referral from the Minister under section 107 of the *Labour Relations Act* in which the Minister asks whether or not his authority under section 45 of the Act is affected by the subsequent referral of the grievance before him to the Ontario Labour Relations Board under section 124 of the Act. Section 45 of the Act provides for an expedited arbitration hearing by a single arbitrator appointed by the Minister upon an application by either party to a collective agreement. Section 124 of the Act provides for an expedited arbitration hearing by the Board upon the referral of a grievance to the Board by a party to a construction industry collective agreement.

2. In this matter the trade union filed a grievance and, by letter dated May 5, 1983, requested the Minister to appoint an arbitrator under section 45 of the Act.

However, on May 17, 1983, the employer referred the same grievance to the Board under section 124 of the Act. The collective agreement under which the instant grievance arose is a construction industry collective agreement. The Minister has not appointed an arbitrator under section 45 but rather has made this reference to the Board.

3. Section 45 of the Act reads:

45(1) Notwithstanding the arbitration provision in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement may request the Minister to refer to a single arbitrator, to be appointed by the Minister, any difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) Subject to subsection (3), a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after thirty days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

(3) Notwithstanding subsection (2), where a difference between the parties to a collective agreement is a difference respecting discharge from or other termination of employment, a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after fourteen days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

(4) Where a request is received under subsection (1), the Minister shall appoint a single arbitrator who shall have exclusive jurisdiction to hear and determine the matter referred to him, including any question as to whether a matter is arbitrable and any question as to whether the request was timely.

(5) Where a request or more than one request concerns several differences arising under the collective agreement, the Minister may in his discretion appoint an arbitrator under subsection (4) to deal with all the differences raised in the request or requests.

(6) The Minister may appoint a settlement officer to confer with the parties and endeavour to effect a settlement prior to the hearing by an arbitrator appointed under subsection (4).

(7) An arbitrator appointed under subsection (4) shall commence to hear the matter referred to him within twenty-one days after the receipt of the request by the Minister and the provisions of subsections 44(6), (7), (8), (9), ~~(10)~~, (11) and (12) apply, with all necessary modifications, to the arbitrator, the parties and the decision of the arbitrator.

(8) Upon the agreement of the parties, the arbitrator shall deliver an oral decision forthwith or as soon as practicable without giving his reasons in writing therefor.

(9) Where the Minister has appointed an arbitrator under subsection (4), each of the parties shall pay one-half of the remuneration and expenses of the person appointed.

(10) The Minister may establish a list of approved arbitrators and, for the purpose of advising him with respect to persons qualified to act as arbitrators and matters relating to arbitration, the Minister may constitute a labour-management advisory committee composed of a chairman to be designated by the Minister and six members, three of whom shall represent employers and three of whom shall represent trade unions, and their remuneration and expenses shall be as the Lieutenant Governor in Council determines.

(11) This section does not apply to a collective agreement in operation on the day this section comes into force but applies to every collective agreement that is renewed or made after that date.

4. Section 124 of the Act reads:

124(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any questions as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

(3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether



the matter is arbitrable, and the provisions of subsections 44(6), (8), (9), (10), (11) and (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

(4) The expense of proceedings under this section, in the amount fixed by the regulations, shall be jointly paid by the parties to the Board for payment into the Consolidated Revenue Fund.

5. Section 118 of the Act reads:

Where there is a conflict between any provision in sections 119 to 136 and any provision in sections 5 to 57 and 62 to 116, the provisions in sections 119 to 136 prevail.

6. The union argues that in the absence of an express restriction against the filing of requests under section 45 by the parties to construction industry collective agreements who could file under section 124, it is entitled to make a request under section 45. The *Malton Sheet Metal* case, [1974] OLRB Rep. Jan. 53 is cited in support of its position in this regard. The union takes the position that once a request has been made under section 45 the Minister is required to appoint an arbitrator. In the face of its request, the union, citing *Spiers Brothers Limited*, [1977] OLRB Rep. April 227 (a case in which the Board refused to assert jurisdiction under what is now section 124 where nominees to a board of arbitration had been appointed under a collective agreement and the nominees had agreed to an arbitrator who had scheduled a hearing date) maintains that the Board does not have jurisdiction in this matter. The union argues further that the matter is not arbitrable under section 124 because it is the employer that has filed a union grievance under the section. In making this argument the union asserts that the *Marshall Gowland Manor* case [1982] OLRB Rep. May 707 does not have application. Finally, the union argues that the type of conflict referred to in section 118 of the Act is a conflict in the language of the statute. Accordingly, it is the position of the union that section 118 of the Act does not apply to the matters at hand. The union explained that it seeks the appointment of an arbitrator under section 45 because, in all likelihood, the arbitrator appointed will convene a hearing in Ottawa.

7. The employer, citing *Marshall Gowland Manor*, *supra* asserts its right to bring a union grievance to the Board under section 124 of the Act. The employer maintains that having brought the union grievance under section 124 there arises a question of jurisdiction which must be characterized as a conflict within the meaning of section 118 of the Act. The employer argues that where such a conflict exists section 118 specifies that the construction industry provisions of the Act prevail. The employer distinguishes the *Spiers* case *supra*, on the grounds that in that case the parties agreed to arbitration under what is now section 44 of the Act and accordingly, waived their right to proceed under section 124. The employer maintains that the *Spiers* case *supra* does not apply where, as in this case, two applications are made. Finally, the employer asserts that on the language of the relevant sections, the Board has jurisdiction under section 124, which was triggered upon its referral, while there is no arbitrator with jurisdiction under section 45 as the Minister has yet to appoint. The employer seeks to have the matter arbitrated under section 124 of the Act because that is the forum which has been used exclusively by these parties in the past and because under section 124 there is a greater likelihood of

having the matter heard by persons with expertise in the construction industry. In these circumstances, the employer asks the Board to assert its jurisdiction and to advise the Minister that he does not have the authority to appoint an arbitrator under section 45 of the Act.

8. There is nothing in the Act to stop the union from applying for the appointment of an arbitrator under section 45 of the Act in respect of a grievance arising under a construction industry collective agreement. However, it is equally clear that the employer is entitled to refer a union grievance to arbitration under the section. Section 45 provides that "a party to a collective agreement may request" the appointment of an arbitrator. The Board found on this language in *Marshall Gowland Manor, supra*, that one party can refer a grievance filed by another party under section 45. Section 124, which provides that "a party to a collective agreement may refer ... a grievance ... to the Board for final and binding determination", contains language which is identical to that contained in section 45 of the Act in respect of who can initiate the referral. Having regard to the similarity in the language and the absence of any policy reasons which would support a different result, we hereby adopt the reasoning and conclusion found in *Marshall Gowland Manor, supra*, in respect of who may refer a grievance under section 45 of the Act, and find that the employer in this case was entitled to refer the grievance in this matter to the Board under section 124 of the Act.

9. There are, therefore, two referrals to arbitration, under different sections of the Act, in respect of the instant grievance. Upon a close reading of the two sections however, and subject to the qualification enunciated in *Spiers Brothers Limited, supra*, it is clear that upon the referral being made under section 124 of the Act the Board has jurisdiction to hear and determine the difference between the parties while, in the absence of an appointment under section 45, there is no arbitrator at this point in time with jurisdiction under section 45 of the Act to hear and determine the difference between the parties. Accordingly, in the absence of agreement between the parties as to which expedited arbitration forum to use, in the absence of jurisdiction having been established under section 45 and in the face of the Board's jurisdiction under section 124, we find that this matter is properly before the Board under section 124 of the Act and that the Board has exclusive jurisdiction to hear and determine this matter.

10. Alternatively, if we are somehow wrong in our finding that the Board has jurisdiction under section 124 at a time when jurisdiction under section 45 has yet to be established, the conflict is one that falls to be resolved under section 118 of the Act. We are of the view that where jurisdiction to hear and rule upon a grievance under a construction industry collective agreement is established under two sections of the Act a conflict exists within the meaning of section 118 of the Act and, accordingly, the construction industry provision, which is tailor-made to the construction industry, prevails. Accordingly, section 124 prevails and the Board has the exclusive jurisdiction to hear and determine this matter.

11. We are compelled to observe that if jurisdiction had been established under section 45 prior to jurisdiction being established under section 124 we would have followed the reasoning set out in *Re Spiers Brothers Limited, supra*, and found that the matter was not arbitrable by this Board under section 124 of the Act. Given the notification procedure and the settlement endeavours of the Office of Arbitration upon

receipt of a section 45 referral, this would occur when the non-grieving party to a construction industry collective agreement decides not to make application under section 124 upon notice of the other side's request for an arbitrator under section 45 of the Act. Where the non-grieving party makes such a section 124 application prior to the appointment of an arbitrator under section 45 however, the Board will have jurisdiction. The effect of our decision, therefore, is to allow either party to direct a construction industry grievance to arbitration under the expedited arbitration procedure provided under the construction industry provisions of the Act. For the policy reasons enunciated by the employer and bearing in mind that expedited arbitration is provided under both sections, we are satisfied that this is the correct result.

12. Having regard to all of the foregoing, our response to the Minister is that in this case he does not have the authority to appoint an arbitrator under section 45 of the Act.

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**0459-83-R United Steelworkers of America, Applicant, v. Northern Plastics Ltd., Respondent, v. Group of Employees, Objectors**

**Petition - Practice and Procedure - Objectors' witness in cross-examination claiming knowledge of threat to other employee - No employee subjected to threats testifying - No allegations made prior to or during hearing by parties - Not Board practice to make own inquiry into alleged threats, intimidation or coercion - Board not permitting matter to be pursued**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members W. F. Rutherford and J. Wilson.

**APPEARANCES:** *Michael Lynk, Wally Turk, Diane Franz, Ann Dick and Barabara Waugh; Brian P. Smeenck and Gerry McGuire for the respondent; Brian Cockell for the objectors.*

**DECISION OF THE BOARD; July 7, 1983**

1. This is an application for certification in which a statement of desire in opposition to the application was filed by a group of employees ("the objectors"). The Board has heard the parties' evidence and it remains for the Board to hear their submissions on that evidence. This is an interim decision dealing with a matter which arose at the end of the examination of the last witness to appear before the Board.

2. The objectors called a witness in reply to certain evidence which had been adduced by the applicant with respect to the origin of the statement of desire ("petition"). Respondent and applicant counsel, in that order, each had the opportunity to cross-examine witness. During applicant counsel's cross-examination, the witness testified that he knew of one employee who had been threatened by her shift [employees], supposedly for not supporting the trade union or opposing it. The nature of the testimony was hearsay. The matter was not pursued further in cross-examination or re-examination of the witness. After conclusion of the examination, counsel for the respondent asserted that the Board should conduct its own inquiry into the alleged threat.

3. In view of the stage of the proceedings, the Board reserved its decision and advised the parties that it would make its ruling prior to the hearing which would be scheduled to receive the parties' submissions on the evidence with respect to the petition.

4. It is not the Board's practice to conduct its own inquiry into allegations with respect to intimidation, threats or coercion related to the exercise of rights under the Act. Rather it inquires into complaints or allegations properly made by the parties coming before it. No allegations were made by the parties herein prior to the application coming on for hearing or at any stage of the proceedings. Nor has any employee come forward as a witness to testify as to any intimidation, threats or coercion directed at him or her.

5. In view of the manner in which the matter arose and the late stage of the proceedings the Board will not consent to the matter being pursued further in these proceedings.

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**1574-82-M** Technical, Office, Professional, Local 1535, Applicant, v. **Northern Telecom**, Respondent

Employee Reference - Practice and Procedure - Board having exclusive jurisdiction to determine employee status - Board ruling in favour of employee status not determining whether included in bargaining unit - Whether in unit must be determined by arbitration - Board reviewing scope of s. 106(2) - Nature of request not clear - Board not appointing officer in circumstances [*This decision was inadvertently omitted from the January 1983 issue*]

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and F. W. Murray.

**DECISION OF THE BOARD;** January 14, 1983

1. This is what purports to be an application under section 106(2) of the *Labour Relations Act*. The application takes the form of two letters from the union dated November 4, 1982, and November 11, 1982, which read as follows:

November 4, 1982

Dear Sir:

At this point in time we have a point of contention with Northern Telecom, Bramalea.

Our problem is with two (2) nonbargaining unit people doing bargaining unit work. We are proceeding through the grievance procedure, however Northern Telecom refuse to bring one of these non bargaining unit people to the grievance hearing.

I hereby request that you send in an impartial referee to resolve this situation.



November 11, 1982

Dear Sir:

I request the Board assign an officer to investigate a violation of the act, namely that the Company has assigned supervisors to perform work of the bargaining unit.

We request this investigation under 106.2 of the act. Supervisors involved were:

D. Champagne  
H. Thornicroft  
R. Luttrell

Work performed by these individuals is similar in scope to that of members of the bargaining unit. The Company contends that they are supervisors.

Our contention is that they are not supervisors based on the fact that they have no one report to them and do not exercise managerial control.

This letter is being sent to further clarify the letter of November 4, 1982 which was sent by myself.

The relevant provisions of the *Labour Relations Act* are sections 1(3)(b) and 106(2);

1.-(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

• • •

(b) who, *in the opinion of the Board*, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

106.-(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

(emphasis added)

2. The purpose of section 1(3) (b) is to ensure that persons in the bargaining unit are not faced with a conflict as between their interests as members of the bargaining unit, and such obligations to their employer as may arise from the exercise of managerial responsibilities. Collective bargaining, by its very nature, requires an arm's length

relationship between the “two sides” whose objectives are sometimes divergent. This conflict of interest problem is avoided by excluding “managerial” personnel from the definition of “employee” and, therefore, from coverage by the Act or participation in collective bargaining. The line is drawn where, *in the opinion of the Ontario Labour Relations Board*, an individual exercises “managerial functions”. That decision is final and binding for all purposes (see sections 106 and 108).

3. One of the ways in which an employee status issue can come before the Board is under section 106(2), when a question arises between the parties as to whether an individual is, or is not, an “employee” *for the purposes of the Act*. It is important to note, however, that the issue before the Board under section 106(2) concerns the application of the statute and the statutory definition of the term “employee” – not whether an individual is covered by a collective agreement. That is a somewhat different issue.

4. A collective agreement has no common law foundation. Its legal characteristics are drawn from the Act, and by definition (see section 1(1)(e)), it prescribes the terms and conditions of “employment” for “employees” represented by the union which, in turn, is an “organization of employees”. Moreover, (see section 50) it is only binding upon “*the employees in the bargaining unit*” defined in it. In both cases, the term “employee” must be taken to exclude persons who by virtue of section 1(3)(b) are not “employees” under the Act. Indeed, given the array of provisions designed to ensure the separation of employer and employees (see sections 1(3)(b), 13, 48, 64 and 106) it would be anomalous if management were in the bargaining unit or covered by the collective agreement. It follows that if an individual exercises managerial functions he is not an “employee” under the Act, and cannot be considered an “employee” for collective bargaining purposes, or to whom the negotiated collective agreement applies. Finally, since employee status under the Act turns on the opinion of the Ontario Labour Relations Board, it is doubtful whether an arbitrator under a collective agreement has any jurisdiction to resolve this issue. It is the opinion of this Board in the exercise of its exclusive jurisdiction which is determinative.

5. For the foregoing reasons, a Board determination that an individual exercises managerial functions and is not an “employee” under the Act may well be determinative of his status under a collective agreement. If, in the opinion of the Board, he exercises managerial functions, then he is not an employee, and the agreement cannot apply. On the other hand, if, in the opinion of Board, he does *not* exercise managerial functions then he is an employee under the Act to whom the agreement *may* apply depending on its terms. But it does not necessarily follow that “all employees” will be covered by an outstanding collective agreement. That depends upon the bargaining unit description which the parties have negotiated. It is not at all unusual for certain employee categories to be excluded from a collective agreement. These employees are not covered by the agreement even though they are legally eligible for coverage. Likewise, it is not unusual for disputes to arise between the parties about the application of the agreement to individuals who are clearly employees, but who may nevertheless be beyond the scope of the agreement because the contractual language is not broad enough to cover their job classifications. These are questions which must ultimately be resolved by arbitration, since they involve the interpretation of the collective agreement. Of course, if the dispute centres on a term such as “foreman”, “supervisor”, or other word intended by the parties to denote managerial status, then the Board decision will probably resolve the

interpretation problem and make a resort to arbitration unnecessary. It is unlikely that the parties intended such terms to include persons who are not really “managerial” under the Act.

6. To summarize then:

- (a) If the issue between the parties involves the status of an employee under the Act, then the Board has exclusive jurisdiction to determine the issue.
- (b) The fact that an individual is an employee under the *Labour Relations Act* does not necessarily mean that he falls within the negotiated scope of any particular collective agreement.
- (c) If an individual is admitted to be an employee under the Act then his inclusion in a negotiated bargaining unit is for an arbitrator to determine.
- (d) Where the parties’ dispute involves language denoting managerial status, the Board’s decision with respect to who is “management” for the purposes of collective bargaining under the Act, will likely be sufficient to resolve the dispute.

7. On the basis of the material before the Board, it is difficult to characterize the issue between the parties. The initial union letter dated November 4, 1982, suggests that the problem involves non-bargaining unit persons doing bargaining unit work. That is not normally an issue which can be resolved under section 106(2). Any restriction on “managerial” persons doing bargaining unit work, must be found in the terms of the collective agreement, and that is a matter of its interpretation, with resort, if necessary, to an arbitrator. If, on the other hand, the union’s position is that certain individuals are *not managerial at all*, because they do not exercise managerial functions and are “employees” under the Act, then that is a matter which the Board can determine. But that decision may or may not determine whether they are covered by the existing collective agreement. As we have already noted, it is quite possible for an individual to be an “employee” under the Act, but still not fall within the language of the scope clause of the collective agreement. We might also note that where an application under section 106(2) is made during the currency of an existing collective agreement, the Board’s practice is to confine its enquiry to the *changes* in the duties and responsibilities of the disputed individuals since that agreement was executed (see *Westmount Hospital*, [1980] OLRB Rep. Oct. 1572.) Finally, we direct the attention of the parties to the general principles enunciated in *Corporation of the City of Thunder Bay* [1981] OLRB Rep. Aug. 1121, and the observations of the Board in *Falconbridge Nickel Mines Limited* [1966] OLRB Rep. Sept. 379 which involves persons performing “mixed” duties some of which are arguably managerial and some of which are not.

8. In the circumstances of this case, as they presently appear, the Board does not consider it appropriate to appoint a Labour Relations Officer. Rather, the Board considers it necessary to solicit further representations from the parties concerning the nature of the dispute between them and, in particular, a brief statement of the duties and

responsibilities which they allege the disputed individuals perform. Accordingly, before proceeding further with this application, the Board deems it appropriate to extend to the parties, and particularly the applicant union, an opportunity to particularize their position and clarify the nature of their dispute.

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**0508-83-U Retail Clerks Union, Local 409, Complainant, v. Northwest Merchants Ltd. Canada, Gerald Robert Kowbel and Janice Eilene Kowbel, Respondents**

Adjournment - Duty to Bargain in Good Faith - Practice and Procedure - Ratification and Strike Vote - Unfair Labour Practice - Adjournment sought to permit respondent to file complaint against union - Board balancing convenience of hearing complaints together and prejudice by delay - Adjournment denied - Change of venue not granted - Employer permitted to propose check-off provision less comprehensive than provided in Act - But proposal not to be taken to impasse - Employer refusing to provide information on hourly rates and benefits during bargaining - Reneging earlier agreement on language - Requiring final offer be ratified by employees - Breaking off negotiations before union can respond to final offer and requesting final offer vote - Bad faith bargaining found - Employer directed to execute collective agreement agreed upon

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members E. J. Brady and E. G. Theobald.

**APPEARANCES:** *Ian E. Reilly, Michael Fraser and Ron Springall for the complainant; no one appearing for the respondents.*

**DECISION OF THE BOARD;** July 21, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that it has been dealt with by the respondents contrary to sections 15, 43, and 89(7) of the Act.

2. A copy of the complaint, blank reply forms, and a formal Notice of Hearing were forwarded to the respondents by the Registrar on June 14, 1983. The (Form 8) Notice of Hearing included the following information:

"1. TAKE NOTICE of the hearing by the Board for THE PURPOSE OF considering the evidence and representations of the parties with respect to all matters arising out of and incidental to the complaint filed under Section 89 of the Labour Relations Act.

2. AND FURTHER TAKE NOTICE that the hearing will take place at the Viking Room, Valhalla Inn, 1 Valhalla Inn Road, Thunder Bay, Ontario, on Thursday, July 7, 1983, at 9:30 o'clock in the forenoon (E.D.T.).

3. IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD



MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS."

3. The respondent Gerald Robert Kowbel, who is the President (and Manager) of the respondent employer, sent the following letter to the Registrar on June 27, 1983 by registered mail:

"We have your letter of June 14, 1983 along with a notice of hearing and a Complaint under Section 89 of the Labour Relations Act.

We are requesting that this matter not go forward on July 7, 1983. We advance the following reasons for that request:

1. An application has been made by the Company to the Minister of Labour pursuant to Section 40 of the Labour Relations Act for an employee vote on our final offer. The results of this vote should be known before the hearing on this matter as the results would have relevance.

The Ministry has not advised as to when the vote will be held. Enclosed is a copy of our application.

2. We intend to file charges against the Union and certain of its officers, and in that regard we hereby request that you furnish us with six copies of Form 58. The charges against the Union ought to be heard at the same time the charges against us are heard. There will not be sufficient time between now and July 7, 1983 for us to receive the forms, prepare the charges and for the service of the documents.

3. July 7, 1983 is not a convenient date for us and if the board will not adjourn these charges as requested in 1. herein then we request a delay to at least the first week of August, 1983.

4. We are requesting that the hearing be held at Kenora, Ontario rather than Thunder Bay. We have spent considerable time and money travelling concerning this whole matter.

Thank you for your consideration."

4. When no one had appeared on behalf of the respondents by 10:00 a.m. on July 7, 1983 at the location specified in the Notice of Hearing, the Board, after considering the contents of that letter and the complainant's submissions in opposition to the requests contained in that letter, ruled that neither an adjournment nor a change of venue would be granted, and that the Board would proceed to hear the complaint. Our reasons for that ruling are as follows.

5. The complainant challenges the legality of the respondent employer's "final offer" and requests that the respondents be directed to sign a collective agreement. Thus, contrary to the respondents' contention that the results of the (section 40) vote should be

known before the hearing of this matter, it appears to the Board that the results of the hearing of this complaint should be known before any vote is conducted, since the Board's disposition of this case may have a direct bearing on whether or not the respondent employer is entitled to have such a vote taken and, if it is so entitled, on the contents of the "offer" that may legally be placed before the employees for purposes of such vote.

6. With respect to the respondents' second reason for requesting an adjournment, we did not find it to be appropriate to delay the hearing of this complaint in order to permit the respondents to "file charges against the Union and certain of its officers". It was (and is) open to the respondents to file a complaint against the complainant and its officers under section 89 of the Act. If such a complaint is filed, it may form the subject matter of a section 89 hearing by this panel or another panel of the Board. However, the possibility that the respondents may file such a complaint and the desirability of hearing such complaint together with the instant complaint, must be weighed against the prejudice which may result to the complainant if the hearing of the present complaint is delayed. As has long been recognized by this Board and by the Courts, "labour relations delayed are labour relations defeated and denied" (see, for example, the unreported judgment of Estey, C.J.O. (as he then was), dated March 31, 1977, in *Journal Publishing Co. of Ottawa Ltd. et al v. Ottawa Newspaper Guild Local 205, OLRB et al*, and the cases cited below). The complainant was certified in September of 1982. The complainant's endeavours to negotiate a collective agreement have already been delayed to some extent by the respondent employer's contravention of section 15 of the Act (as found by another panel of the Board, chaired by the present Vice-Chairman, in a decision dated May 12, 1983, as yet unreported, in File No. 0180-83-U). Further delay can only result in additional prejudice to the legitimate interests of the complainant and the bargaining unit employees whom it represents. Thus, the Board did not find it appropriate to adjourn the hearing of this complaint pending the filing of a section 89 complaint by the respondents.

7. The third reason specified for the requested adjournment is that July 7, 1983 "is not a convenient date" for the respondents. However, the Board does not schedule its proceedings, nor grant adjournments, on the basis of "convenience" to a party. The Board has a discretion to adjourn any hearing, if it considers it advisable in the interests of justice, for such time and to such place and upon such terms as it considers fit (see section 82(1) of the Board's Rules of Procedure; see also section 21 of the *Statutory Powers Procedures Act*, R.S.O. 1980, c. 484). In exercising this discretion, the Board has adopted a policy which recognizes the great importance of expedition to the efficacious administration of the *Labour Relations Act*. In *Labour Relations Bureau of Ontario General Contractors Association*, [1979] OLRB Rep. 1036, at paragraph 8, the Board stated:

".... The usual practice of the Board is to grant adjournments only on the consent of all of the parties to a proceeding. With respect to situations where one party is not prepared to agree to an adjournment, in the *Baycrest Centre of Geriatric Care* case, [1976] OLRB Rep. 432, the Board stated at page 433:

'5. The Board policy with respect to adjournments has been capsulized in the *Nick Masney* case [1968] OLRB Rep. 823 (upheld in the Ontario Court of Appeal, ¶70 CLLC 14, 024) wherein the Board stated:

'... the Board's decision to deny the respondent's request for an adjournment was based on the Board's practice to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party i.e., where it is proven that a witness essential to the party's case is unable to attend because of serious illness ...'".

The powers of the Board with respect to adjournments were confirmed by the Ontario Divisional Court in *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879* (1979), 24 O.R. (2d) 400, at pages 404 and 405:

"Clearly, an administrative tribunal such as the Labour Relations Board is entitled to determine its own practices and procedures. Whether in a given case an adjournment should or should not be granted is a matter to be determined by the Board charged as it is with the responsibility of administering a comprehensive statute regulating labour relations. In the administration of that statute the Board is required to make many determinations of both fact and of law and to exercise its discretion in a variety of situations. In the case of a request for adjournment, it is manifestly in the best position to decide whether, having regard to the nature of the substantive application before it, the adjournment should be granted or whether the interests of the employer, the employees or the union who, as the case may be, oppose the adjournment should prevail over the party seeking it. As a matter of jurisdiction, it is for the Board to decide whether it should adjourn proceedings before it and in what circumstances.

This is not to say that there cannot be situations in which a refusal to grant an adjournment might amount to a denial of natural justice. There are circumstances in which that might be so: see, for example, *R. v. Ontario Labour Relations Board, Ex p. Nick Masney Hotels Ltd.*, [1970] 3 O.R. 461, 13 D.L.R. (3d) 289 (C.A.); *Re Gill Lumber Chipman (1973) Ltd. and United Brotherhood of Carpenters & Joiners of America, Local Union 2142* (1973), 42 D.L.R. (3d) 271, 7 N.B.R. (2d) 41. It is necessary to examine the facts of each case to determine if the tribunal acted, as it must, in a fair and reasonable

way. It must, of course, comply with the provisions of the *Statutory Powers Procedure Act*, 1971 (Ont.), c.47, and afford the parties the opportunity to be present and be represented, if they wish, by counsel. But a party who has adequate notice of the hearing does not have a right to an adjournment and is not entitled to insist on one for his convenience or the convenience of his representative. It is for the Board to determine whether to adjourn on the basis of the obvious desirability of speedy and expeditious proceedings in labour relations matters, the background of the particular case, the issues involved, the reason for the request and other like factors.

• • •

It cannot be suggested that the Board may not in the exercise of its discretion adopt a general policy respecting adjournments of its proceedings: see *The King v. Port of London Authority, Ex p. Kynoch, Ltd.*, [1919] 1 K.B. 176. That policy is obviously necessary to the proper administration of the Board's process ...."

8. The Board also ruled against the respondents' written request that the hearing of this matter be held in Kenora rather than Thunder Bay. While we recognize that travelling from Keewatin to Thunder Bay would involve an expenditure of "time and money" by the respondents, the hearing of this matter in Thunder Bay rather than in Toronto, where most such complaints are heard, substantially reduced those potential expenditures. Two of the persons who appeared on behalf of the complainant at the hearing of this matter travelled to Thunder Bay from Toronto, and would have been put to an additional monetary and time expenditure if the hearing had been scheduled in Kenora. Moreover, the efficient and effective utilization of the resources of the Board, and its responsibility to process this complaint and other matters pending before it as expeditiously as possible, must also be considered. Having regard to all those factors, the Board found it appropriate to hear this matter in Thunder Bay and to deny the respondents' request that the location of the hearing be changed to Kenora.

9. The sole witness who testified before the Board at the hearing of this matter was Ian E. Reilly, a Co-ordinator employed by the United Food & Commercial Workers International Union (the "International"), who had been assigned by the International's Canadian Director to assist the complainant in collective bargaining with the respondent employer. The facts set forth below are based on Mr. Reilly's candid and credible testimony, and the twelve exhibits which he introduced into evidence during the course of his testimony.

10. On September 7, 1982 the complainant was certified as the bargaining agent for "all employees of Northwest Merchants Limited Canada in the Town of Keewatin, Ontario, save and except manager, persons above the rank of manager and secretary book-keeper" by a Board certificate issued pursuant to a decision of another panel of the Board (in File No. 0643-82-R). Thereafter, the complainant served a notice to bargain, and the parties met and bargained concerning non-monetary items.

11. The complainant subsequently filed an application under section 101(1) of the Act for consent to institute a prosecution of the respondent employer for an offence



under the Act (File No. 2646-82-U), and a complaint under section 89 of the Act in which it alleged that the respondent employer had contravened section 15 of the Act. At the hearing of those consolidated matters on May 9, 1983, another panel of the Board, chaired by the present Vice-Chairman, gave the following oral decision, which was confirmed in a written decision dated May 12, 1983:

"Having regard to all the evidence and the submissions of the parties, the Board is unanimously of the view that although the respondent has contravened section 15 of the Act by failing to make every reasonable effort to make a collective agreement, no useful purpose would be served by the Board giving the trade union consent to institute a prosecution in respect of that matter. In reaching this conclusion we have taken into account the fact that the respondent's refusal to table a monetary offer was based at least in part upon the fact that union official Ron Springall told the company representatives that there would be no monetary discussions until all non-monetary contract language was resolved. We have also taken into account the fact that the union never at any time tabled specific monetary proposals for consideration by the company. Nevertheless, we are satisfied that the respondent has breached section 15 by refusing to discuss monetary matters even though the parties were at impasse concerning non-monetary items. It is not the intent of the *Labour Relations Act* that strike or lock-out action be taken before the parties have discussed all bargaining matters, including monetary items, with a view to avoiding economic sanctions.

Accordingly, the Board, pursuant to section 89 of the Act, hereby directs:

- (1) that the complainant trade union provide the respondent on or before May 16, 1983, with a full written statement of its current position with respect to all outstanding items, including specific monetary proposals, and with a written statement of all items which have been tentatively resolved;
- (2) that the respondent provide the complainant with a written response to those proposals on or before May 23, 1983; and
- (3) that the parties thereafter return to the bargaining table forthwith with the assistance of a Ministry of Labour mediator, and bargain in good faith and make every reasonable effort to make a collective agreement."

12. Pursuant to that direction, on May 10, 1983 Mr. Reilly sent a proposed collective agreement to the respondent employer by registered mail. That document included items to which the parties had already agreed (which were "highlighted in pink"), items previously proposed by the respondent employer to which the complainant was thereby agreeing (which were "highlighted in blue"), and the following six items which remained in dispute: Article 2.01 (the recognition clause, which the complainant

maintained should describe the bargaining unit in the same manner in which it was described by the Board in its certification decision dated September 7, 1982 and in the certificate issued pursuant to that decision), Article 5.02 (the "normal hours of work"), Article 6.01 (overtime rates of pay), Articles 15.02 and 15.03 (seniority), Article 21.01 (a proposal by the complainant that the respondent employer provide a weekly indemnity plan for employees), and Appendix "A" (a proposal by the complainant that the "present wage scale" be increased by 30¢ per hour and that the respondent employer pay 100% of the cost of O.H.I.P.). One of the items "highlighted in pink" was Article 4 which provided as follows:

#### "ARTICLE 4

#### DEDUCTION OF UNION DUES

4.01 Pursuant to Section 43 of the Labour Relations Act the Company agrees to deduct from the wages of each employee in the bargaining unit, except probationary employees, the amount of regular monthly union dues and to remit the amount so deducted to the Union.

4.02 The amount of union dues shall be as authorized by regular and proper vote of the membership of the bargaining unit, of the local Union. Monies so deducted will be transmitted to the designated official of the Union.

4.03 The Company agrees to list on the Dues Deduction Sheet, all employees who have terminated their employment and new hires."

13. The respondent employer replied to that document by registered letter dated May 20, 1983 to M. Grossman, the Ministry of Labour mediator appointed to assist the parties in accordance with the Board's direction. The respondent employer also sent a copy of that letter to Mr. Reilly, who received it on May 24, 1983. Apart from noting that the "front cover" for the collective agreement which had been "signed off by the parties" listed the respondent employer first rather than the complainant, that letter did not dispute the accuracy of any of the detailed information contained in the (May 10, 1983) documentation provided by the complainant concerning the items "which had already been agreed to", including Article 4 (deduction of union dues) as set forth above. That letter specified the respondent employer's position concerning the aforementioned six items which were then outstanding, and "a proposed Appendix "B", submitted by the Company", which was also outstanding.

14. The recognition clause proposed by the respondent employer prior to that letter was:

"2.01 The Company recognizes the Union as the bargaining agent for all its employees in the Town of Keewatin, Ontario, save and except for Managers, (STORE MANAGER, GROCERY MANAGER, MEAT MANAGER, AND GIFT SHOP MANAGER) persons above the rank of Managers and Secretary Bookkeeper, *AND PERSONS UNDER 18 YEARS OF AGE.*"

In the respondent employer's revised proposal on that item (attached to its letter of May 20, 1983) the words "AND PERSONS UNDER 18 YEARS OF AGE" were deleted and the following words were substituted in their place: "and students". Also attached to that letter were the respondent employer's proposals concerning Articles 5.02, 6.01, 15.02, 21.01, Appendix "A", and Appendix "B". The latter Appendix provided as follows:

"SPECIAL PROVISION

IT IS UNDERSTOOD AND AGREED THAT THIS  
AGREEMENT DOES NOT APPLY TO ALEX DYCK,  
OR TO ANY PERSON HIRED SUBSEQUENTLY TO  
DO THE WORK OF THE KIND OR NATURE  
PRESENTLY BEING DONE BY MR. DYCK.

DATED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_ 1983."

With respect to Article 15.03 the respondent employer's letter of May 20th indicated that it "can be considered as resolved" since "the Company is prepared to accept the proposal of the Union".

15. On May 25, 1983, Mr. Reilly sent the following letter to the respondent employer by registered mail:

"I am in receipt of your letter to Mr. M. Grossman, dated May 20, 1983.

Upon reading Appendix 'A', A.5, I note that you wish to make certain no one suffers a wage reduction. I couldn't agree more, however, since I do not have the present wages paid to employees, I would hereby request that a list of job [sic] and employees and the hourly rates now paid them be provided upon the commencement of talks on June 6th, in order that I may intelligently bargain with you."

16. The parties subsequently agreed to meet in Kenora on June 6, 1983 with the assistance of a mediator. That meeting was held in the evening at the request of the respondents, in order to permit them to attend to their business during the day. In attendance at that meeting were Mr. Reilly and Michael Fraser for the complainant, Mr. and Mrs. Kowbel (the individual respondents) for the respondent employer, and mediator Robert Pryor (replacing Mr. Grossman, who was unavailable that evening). At that meeting Mr. Kowbel refused to provide Mr. Reilly with the information which the latter had requested in his letter of May 25, 1982, and also refused to inform Mr. Reilly of the respondent employer's "existing practice" concerning sick leave. The reason given by Mr. Kowbel for those refusals was that the employer was not obliged to give anything to the union unless it was specifically required to do so by the *Labour Relations Act*. Mr. Kowbel remained unmoved by Mr. Reilly's assertion that Board decisions require an employer to provide such information pursuant to section 15 of the Act.

17. The section 15 bargaining duty includes an obligation that the employer provide information of the type requested by Mr. Reilly on behalf of the complainant. As

stated by the Board in *De Vilbiss (Canada) Limited*, [1976] OLRB Rep. March 49, at paragraph 15, one of the principal functions of the duty described in section 15 of the Act is "to foster rational, informed discussion". In that case the complainant trade union asked, at its first bargaining session with the employer, to be provided with the existing wage rates and classifications of the bargaining unit employees. In finding the employer's refusal to provide that information to be a breach of what is now section 15 of the Act, the Board wrote (at paragraph 16):

"... Of additional concern is the respondent's failure to respond to the complainant's request at this first meeting for existing wage and classification information. Particularly in 'first agreement' situations, it is little wonder that a complainant would have an incomplete monetary demand until it fully appreciated the current rate of wages paid by a respondent and the detailed nature of its job structure. Rational and informed discussion cannot easily take place until this information is provided to a trade union and thus this aspect of the duty supports its production. As a general matter of policy, if parties are to engage in economic conflict their differences ought to be real and well-defined. It is patently silly to have a trade union 'in the dark' with respect to the fairness of an employer's offer because it has insufficient information to appreciate fully the offer's significance to those in the bargaining unit. Moreover, a trade union has a duty to all of the employees in the bargaining unit and thus has to be concerned, in a large measure, with equality of treatment. (For the American experience in this area see *J. H. Allison & Co* (1946) 70 NLRB 377; *Whittin Machine Works* (1954), 217 F. 2d 593 (4th Cir.); *Yanman & Erbe Manufacturing Co.* (1951) 181 F. 2d (2nd Cir.); *Truitt Manufacturing Co.* (1954) 110 NLRB 856; and see generally Bortosic and Hartley, [*The Employer's Duty to Supply Information to the Union: A Study of Interplay and Judicial Rationalization* (1972), 58 Cornell L. Rev. 23].) Further, in the facts at hand, we have no doubt, when the totality of the respondent's conduct is considered, that the 'bad faith' aspect of the duty also effectively characterizes the respondent's failure in this regard. But, as noted above, a finding of bad faith is not a prerequisite to a finding that section 14 [now section 15] has been violated."

See also *Globe Spring & Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303. Thus, we find that the respondent employer contravened section 15 of the Act by failing to provide the requested information to the complainant.

18. Notwithstanding the respondent employer's failure to provide the aforementioned information to which the complainant was legally entitled, Mr. Reilly, to the obvious surprise of Mr. and Mrs. Kowbel, proceeded to accept (on behalf of the complainant) the respondent employer's proposals concerning Articles 5.02, 6.01, and 15.02. Although the complainant's representatives were not totally satisfied with those proposals, they accepted them because they were of the view that they "wouldn't get anything better", and because they hoped to negotiate improvements during the next round of collective bargaining after the parties had "lived together" for a year under their



first collective agreement. Thus, the only items which remained in dispute between the parties at that time were Article 2.01 (the recognition clause), Article 21.01 ("weekly indemnity"), Appendix "A", and Appendix "B".

19. The mediator then asked the union representatives to leave the room while he met privately with the respondents. Thereafter, at approximately 7:20 p.m., he brought the complainant the following offers from the respondent employer (which were referred to by Mr. Reilly as the employer offer of "19:21 hours"):

"OFFER 1

2.01 The Company recognizes the Union as the bargaining agent for all its employees in the Town of Keewatin, Ontario save and except for Managers, (STORE MANAGER, OR GROCERY MANAGER, OR MEAT MANAGER, OR GIFT SHOP MANAGER) persons above the rank of Managers and Secretary Bookkeeper, *AND PERSONS UNDER 18 YEARS OF AGE.*

2.02 It is agreed that in addition to the Store Manager not more than one Manager is excluded from the bargaining unit.

2.03 In this collective agreement, the use of masculine terms shall also include the feminine and vice-versa unless otherwise indicated by the contract."

20. That offer was accompanied by an alternative offer ("Offer II") by which the respondent employer offered to delete the proposed exclusion from the bargaining unit of "persons under 18 years of age", with the balance of Articles 2.01, 2.02 and 2.03 remaining as in "Offer I", but with an amendment to Article 4.01. The proposed amendment to that article was set forth in the following "Note" which formed part of "Offer II":

"If this alternative is acceptable then the previously agree [sic] article 4.01 must be ammended [sic] to read as follows:

4.01 Pursuant to Section 43 of the Labour Relations Act the company agrees to deduct from the wages of each employee in the bargaining unit, except probationary employees, and students as defined in the Employment Standard Act Regulations, the amount of regular monthly dues and to remit the amount so deducted to the Union."

Thus, each of the two alternative offers proposed the exclusion of an additional "Manager" from the bargaining unit for which the complainant had been certified. "Offer I" also proposed the exclusion of "persons under eighteen years of age". Although the latter persons were included in the bargaining unit proposed in "Offer II", under that offer no union dues would be deducted from the wages of "students", despite the fact that they would be included in the bargaining unit, and despite the fact that the parties had already reached agreement on Article 4.01 in a form which excluded only "probationary employees" from its coverage.

21. Each of those alternative offers also included a revised Appendix "A" in which the (Article A.1) wage rates specified for full-time employees "after two to three years", and "after three years", and for part-time employees "after 2080 working hours to 4160 working hours" had been increased by 25¢ (above the rates specified for those persons on the "progression scales" contained in Appendix "A" attached to the respondent employer's letter of May 20, 1983). The (Article A.2) wage rate specified for part-time employees "after 4160 to 6240 working hours" was increased by 35¢, and a new wage rate (of \$5.50 per hour) for part-time employees "after 6420 working hours" was added. (In the respondent employer's May 20, 1983 Appendix "A" proposal, the highest rate in the part-time employee "progression scale" was "\$4.40 per hour", payable after 4160 working hours".) That Appendix also proposed the following three articles:

"A.3 Notwithstanding the minimum hourly rates set forth herein, a *student* as referred to in the Regulations under the Employment Standards Act may be paid the minimum wage rate set out in the said Regulations for students.

A.4 For the purpose of determining working hours for the purposes of this appendix only, paid holidays (Article 7) and Vacations (Article 10) shall be considered to be working hours.

A.5 No employee currently on staff shall suffer an hourly wage rate reduction as a result of the implementation of this Appendix 'A'."

22. The complainant's written reply to those offers was as follows:

"2.01 It is the union position that the O.L.R.B. certificate bargaining unit as set out therein is our position except that we will agree to the exclusion of Alex Dyck and the person subsequently hired to replace him.

21.01 The employer will provide 1 sick day with pay per month to all employees who have at least 3 months service. All unused sick days will be cashed in at 50% of value on Dec 22nd of each year.

#### Appendix 'A'

(a) All rates in the company proposal of June 6/83 19:21 hours shall be increased by 15 cents in each case.

(b) All present employees shall receive 20¢ per hour increase over their present wage or the new wage rate, whichever is greater, on the day of signing.

(c) The parties hereto agree that students employed during the school vacation periods shall be paid in accordance with the minimum standards act, notwithstanding [sic] the terms of this agreement.

(d) The parties hereto agree [sic] that a part time employee is one working 24 hours per week or less."

Mr. Pryor took that offer to the respondents. While they were reviewing it, Mr. Reilly put together (and signed on behalf of the complainant) a document which included all the language to which the parties had thus far agreed, and which also indicated that the complainant had dropped its sick pay proposal (Article 21.01) and confirmed that the complainant was no longer proposing that the respondent employer pay the cost of O.H.I.P. coverage for employees. Through that document, the complainant also accepted the wage rates proposed by the respondent employer in Articles A.1 and A.2 of Appendix "A" to its offer of "19.21 hours", and further accepted Articles A.4 and A.5 of that proposal. With respect to Article A.3, the complainant proposed the following:

"The parties hereto agree that students employed during the school vacation periods shall be paid in accordance with the minimum standards act, notwithstanding the terms of this agreement."

The complainant further proposed that the following clause be added to Appendix "A":

"The parties hereto agree that a part-time employee is one working (24) twenty-four hours per week or less."

23. That comprehensive collective agreement proposal was then taken to the respondents by Mr. Pryor, who returned fifteen or twenty minutes later with the following "final offer" from the respondent employer:

"Article 4  
Deduction of Union Dues

4.01 Pursuant to Section 43 of the Labour Relations Act the Company agrees to deduct from the wages of each employee in the bargaining unit, except probationary employees the amount of regular monthly union dues & to remit the amount so deducted to the union.

It is further agreed that part time employees who customarily work 24 hours a week or less, and students as defined by the employment standards Regulations shall not have Union Dues deducted from their wages.

- 1) Article 2.01 as per certificate
- 2) Wage proposal - as proposed June 6
- 3) Exclusion of Alex Dick [sic]
- 4) Must be taken to Our membership for Ratification."

Mr. Reilly was very upset by that proposal since it confirmed the respondent employer's intention to attempt to renege on the language to which the parties had already agreed in respect of Article 4.01. It also purported to impose a requirement that the respondent employer's offer be taken to the union membership for ratification. In the circumstances of this case, it is reasonable to infer that the respondents added that requirement in an

attempt to avoid entering into a collective agreement with the complainant when it became apparent that Mr. Reilly had been given the authority to enter into a collective agreement on behalf of the complainant and was ready, willing, and able to do so that very evening.

24. After arranging to have Mr. Pryor bring to the complainant's representatives that "final offer" together with an announcement of their intention to apply for an employee vote under section 40 of the Act, Mr. and Mrs. Kowbel left the premises without giving the complainant any opportunity to discuss that offer with them, or to accept or otherwise respond to it.

25. By registered letter dated June 7, 1983 the respondent employer confirmed the "request made at the time [its] final offer was made, which was to the effect that a vote of [its] employees be taken as to their acceptance or rejection of the total first collective agreement."

26. The complainant subsequently filed the present complaint, and the respondent employer requested the Minister to direct that an employee vote be taken pursuant to section 40(1) of the *Labour Relations Act*, which provides:

"Before or after the commencement of a strike or lock-out, the employer of the employees in the affected bargaining unit may request that a vote of such employees be taken as to the acceptance or rejection of the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties and the Minister shall, and in the construction industry the Minister may, on such terms as he considers necessary direct that a vote of such employees to accept or reject the offer be held and thereafter no further such request shall be made."

27. When the complainant became aware that the respondent employer had applied for a section 40 vote, it sent the following telegram to the Minister:

"The employer's final offer is in violation of the Ontario Labour Relations Act and charges have been filed with the Board under Section 89 thereof.

A hearing has been scheduled for July 7, 1983 in this matter.

There is no strike pending or anticipated as the Union has already signed an agreement that is legal and the response to that document, which was put forward through your mediator, Robert Prior [sic], was the Company's illegal final offer.

It is our request that no vote be taken as the union has signed a collective agreement, but the company had failed to sign and further that the matter be laid over until after the Section 89 hearing on File No. 0508-83-U."



28. From the foregoing findings of fact, it is apparent that the respondent employer, through the acts and omissions of the individual respondents, has engaged in a series of substantial contraventions of section 15 of the Act. In addition to their refusal to discuss monetary matters, which led to an earlier finding of a section 15 violation (and the Board order quoted above), the respondents have refused to provide the complainant with information concerning existing hourly rates and employee benefits, have reneged (without explanation or justification) on their earlier agreement concerning the language of Article 4.01; have pressed to the point of impasse a demand that the complainant accept a dues check-off provision less encompassing than that to which it is entitled under section 43 of the Act, have purported to attach to their "final offer" a requirement that the complainant submit that offer to the employees for ratification, and have broken off negotiations and applied for a section 40 vote without giving the complainant an opportunity to discuss that "final offer" with them and to accept or otherwise respond to it.

29. It was not improper for the respondent employer to request during the course of collective bargaining a recognition clause less extensive than the certificate granted to the complainant by the Board. Thus, it was open to the parties to agree (as they have done) to the exclusion of "Alex Dyck and his replacement who may be subsequently hired". The question of recognition, or an extension or diminution of recognition, is a permissible subject for negotiations between a union and an employer. However, while such issues can be raised and discussed during bargaining, they cannot be pressed to an impasse, or become the focus of a test of economic strength. See, for example, *Cybermedix Limited*, [1981] OLRB Rep. Jan. 13, and *United Brotherhood of Carpenters and Joiners of America*, [1978] OLRB Rep. Aug. 776. Similarly, in *Toronto Star Newspapers*, [1979] OLRB Rep. Aug. 811, the Board ruled that it would not be consistent with the overall scheme of the Act to take a demand for work assignment, which could form the subject matter of a section 91 complaint, to a bargaining impasse.

30. We are of the view that similar principles apply to section 43 of the Act, which provides:

"43(1) Except in the construction industry and subject to section 47, where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union, forthwith.

(2) In subsection (1), 'regular union dues' means,

(a) in the case of an employee who is a member of the trade union, the dues uniformly and regularly paid by a member of the trade union in accordance with the constitution and by-laws of the trade union; and

(b) in the case of an employee who is not a member of the trade union, the dues referred to in clause (a), excluding any amount in respect of pension, superannuation, sickness insurance or any other benefit available only to members of the trade union."

The purpose and effect of that provision was considered by the Board in *K Mart Canada Limited*, [1982] OLRB Rep. June 903. In that case, the employer remitted a "lump sum" to the union but refused to identify the employees for whom the dues were being deducted. In finding the employer to be in breach of the collective bargaining obligation required to be in its collective agreement by section 43, the Board wrote:

"10. Both the old section 36a and its amended version in section 43, deal with the question of 'union security'. There is perhaps no single issue which has contributed more to industrial conflict in this province — especially in first contract situations where the union may be seeking to establish its legitimacy in the face of employer opposition. Once certified, unions typically insist on a 'checkoff' of dues from all employees as the natural concomitant of their statutory obligation to represent members and non-members alike (see section 68), and as the only means of financial support for the representational activities which benefit all employees. But not infrequently, employer resistance on this issue has resulted in a strike. Sometimes this opposition is merely a manifestation of loyalty to non-member employees; but sometimes, it has been part and parcel of an employer refusal to recognize the union, despite its certification, or an element in a general pattern of unfair labour practices designed to undermine the union's position. (See for example: *Radio Shack* [1979] OLRB Rep. Dec. 1220; *Fotomat* [1980] OLRB Rep. Oct. 1397; *Wilson Automotive* [1980] OLRB Rep. July 1136, [1980] OLRB Rep. Sept. 1337; *Fleck Manufacturing Company* [1978] OLRB Rep. July 615). These cases may be atypical, however, even when the employer's opposition is legitimate, (see: *Cross Tube Products Inc.*, [1980] OLRB Rep. May 669), there is little doubt that the effort to attain union security has been a key factor in a number of protracted, difficult and often ugly disputes which have marked the collective bargaining scene in recent years. Indeed, in 1975, the 'checkoff' was the principal issue in dispute between the parties herein, leading to a six month strike, and it might have precipitated a strike in 1980, when the union was certified for a second time, if the legislation had not removed that item from the bargaining table. See: *K Mart Canada Limited*, *supra*). The recognition that the union security issue was a flash point in the bargaining process is what prompted the Legislature to enact the succession of amendments mentioned above. And until the instant case arose, it was widely thought that a demand for the 'checkoff' could no longer be the basis for a strike in this jurisdiction.

11. The question raised by this complaint then, is the extent to which the union security issue in the form of a statutory 'checkoff', has been

removed from the bargaining table. Does the union have a right to know specifically the identity of the employees in the bargaining unit it represents, and whether dues have been properly remitted on behalf of those *specific* individuals? Or is the right to this information a bargaining issue for which the union must ultimately strike if the employer is not prepared to provide it? If the principle of the checkoff has now been given statutory recognition and underpinning, must the union still strike to achieve a formula that is workable from an administrative point of view. In other words, is the 'checkoff' a 'live' bargaining issue and a potential source of industrial conflict despite section 43—for it must be remembered that although the bargaining unit is relatively small in this case, the principle flowing from it would be equally applicable in a much larger bargaining unit where there would be no effective means of verification.

12. There is no legitimate employer interest in masking the identity of its employees, and it is a little difficult to appreciate why the Legislature would choose the formula which the respondent's interpretation involves. If anything, it is the union which has a legitimate interest in obtaining such information because of sections 43 and 68 of the Act, and its statutory role as the employees' bargaining agent. The dues deducted do not 'belong' to the employer. It is merely the agent for the union for the purpose of collection. Thus, we do not find particularly compelling the employer's submission that the information the union seeks is a matter for collective bargaining. On the contrary, in our opinion, the acceptance of this position would put back on the bargaining table the very kind of inflammatory issue which section 43 was designed to resolve—with obvious detriment to the orderly process of collective bargaining which the amendment was intended to promote. This Board does not lightly contemplate an interpretation of the Act that would once again see strikes in Ontario on the issue of union security—not for the principle of a checkoff, for that was clearly established by section 43 but this time for a formula that would make section 43 workable. In our view, such an interpretation of section 43 flies in the face of its obvious intent, and we should not embrace it in the absence of clear and compelling statutory language."

31. Once a union that is the bargaining agent for employees in a (nonconstruction industry) bargaining unit requests the inclusion in a collective agreement of a section 43 dues deduction provision, that section requires the employer to include such provision in the agreement. A union can, of course, refrain from requesting such a provision. Moreover, it can agree to a provision which is less comprehensive in scope than the clause for which section 43 provides. Thus, it was open to the complainant to agree (as it did before the employer purported to renege on such agreement) to a check-off clause which excepted from its scope "probationary employees", even though such employees were included in the certificate and in each of the various recognition clauses proposed by the complainant or the respondents during the course of collective bargaining. However, while it may be permissible for an employer to propose a check-off provision

which is less comprehensive than that contemplated by section 43, such proposal cannot be pressed to an impasse, or become the focus of a test of economic strength. Therefore, we are of the view that, unless it has been agreed to by the union, such proposal cannot be included in "the offer of the employer" which is placed before the employees in a section 40 vote, as by placing that issue before the employees, the employer would be pressing the issue to an impasse, contrary to section 15 of the Act. Therefore, by applying for a section 40 vote in respect of an offer which included a nonconsensual proposal to exclude "part-time employees" and "students" from the scope of the union dues deduction clause (Article 4.01), the respondent employer contravened section 15 of the Act in the circumstances of this case.

32. The respondent employer also contravened section 15 of the Act in respect of Article 4.01 when it reneged on the language to which it had earlier agreed in respect of that provision, by subsequently proposing additional exclusions and seeking to have employees vote on a check-off clause which was not in conformity with the language to which it had earlier agreed. The fact that a party modifies a bargaining position or withdraws an offer previously made does not constitute a "per se" violation of section 15. As noted by the Board in *Cybermedix Limited*, *supra*, at paragraph 18:

"'Reneging' has also been considered in a number of Board decisions; but the fact that one party modifies a bargaining position or withdraws an offer previously made has never been sufficient, in itself, to constitute a 'per se' violation of section 14. As the Board noted in *Pine Ridge District Health Unit* [1977] OLRB Rep. Feb. 65, collective bargaining is a dynamic process which:

...occurs over an extended period of time against a fluid backdrop of events. A party may thus come to reshape its views of its own best interests from one point in time to another, and so wish to change its position at the bargaining table.'

The passage of time, changes in economic circumstances, or shifts in the balance of bargaining power can influence one party or the other to reevaluate its position, or insist on concessions not previously sought. Such changes in bargaining posture cannot be automatically equated with bad faith bargaining—although in some cases, of course, an employer's sudden and inexplicable inflexibility, or a radical change in bargaining stance may provide strong evidence of bad faith bargaining, or support an inference that it is engaging in 'surface bargaining' and has no real intention of concluding a collective agreement...."

Having regard to all of the circumstances, including the fact that the respondent employer did not provide during the course of bargaining, or at the hearing of this matter, any explanation for reneging on the language of Article 4.02 to which it had earlier agreed, the Board finds that it thereby contravened section 15 of the circumstances of this case.

33. It is well established in the Board's jurisprudence that an employer cannot legally insist on employee ratification of collective agreement proposals (except to the



extent that section 40 of the Act permits an employer to have his last offer put before the employees in the bargaining unit for acceptance or rejection, as discussed later in this decision). The labour relations rationale for this conclusion is set forth in the following passage from *Treco Machine & Tool Limited*, [1982] OLRB Rep. Dec. 1954, in which the respondent employer proposed the inclusion in a collective agreement of an article which stipulated that the “total bargaining unit” would “participate in the ratification of the collective agreement”:

“12. Our determination in this matter begins with a discussion of the purpose and legal effect of certification under the *Labour Relations Act*. Trade unions are not permitted to strike in an attempt to secure recognition. Rather, the Act, in furtherance of the purpose of encouraging the practice and procedure of collective bargaining, contains an elaborate statutory scheme for the selection by employees of a bargaining agent of their choice. This scheme is based on an application of the majority principle. The Board is given the authority under the Act to determine trade union status, to determine the appropriate bargaining unit on a case by case basis and to determine if a trade union has the support of a majority of those in the bargaining unit. Majority support is determined by means of a secret ballot vote by those within the bargaining unit, as in this case, or, as is more often the case, on the basis of the signed evidence of membership of those within the unit submitted by the union in support of its application. If the Board is satisfied that the applicant is a trade union within the meaning of the Act and that it has the support of a majority of those within the unit, it is certified by the Board as the exclusive bargaining agent for all of the employees in the bargaining unit. The certificate thus issued alters the legal relationship between the employer and the employees in the bargaining unit. The employer is no longer permitted to deal with the employees in the bargaining unit on an individual basis but must deal with the trade union as the certified bargaining agent of all of the employees in the unit.

13. The exclusivity of the union’s bargaining rights, as conferred by a Board certificate, and the requirement upon the employer to deal with the union, as the certified bargaining agent, and not to go behind the certificate, has received extensive judicial support. [Quotations from the Supreme Court of Canada decisions in *Re Syndicat Catholique des Employes de Magasins de Quebec Inc. v. Compagnie Paquet Ltee* (1959) S.C.R. 206, 18 D.L.R. (2d) 346, and *McGavin Toastmaster Ltd. v. Ainscough* [1976] S.C.R. 718, [1975] 5 W.W.R. 444, 75 CLLC ¶14,277, 54 D.L.R. (3d) 1 have been omitted.]

(See also *Winnipeg Police Association and City of Winnipeg*, [1979] 4 W.W.R. 193.)

14. This Board has dealt with a number of cases in which it has found that an employer’s attempt to require employee ratification of an offer of settlement acceptable to the union constitutes an attempt to

repudiate the union as exclusive bargaining agent and hence is in breach of the Act. In *Wilson Automotive, supra*, the employer requested a section 34(e) vote (now section 40) on an offer which the union had already signed and returned to the company for execution. In response the union filed a section 14 (now 15) complaint alleging that by requesting a section 34(e) vote in the circumstances the employer had bargained in bad faith. In upholding the complaint the Board found that:

'By refusing to accept the union's execution of the collective agreement and insisting on a ratification vote among all of the employees, the respondent has in fact refused to recognize the union as the body with the exclusive authority to make a collective agreement ....

... The union's bargaining rights therefore continue in full force and effect. Whatever reservations the employer may have, it is not entitled to doubt or deny these rights at the bargaining table.

By not making a better offer and then insisting on a ratification vote of all employees, the employer would set the stage for a plebiscite calculated to undermine the union. The most plausible inference to be drawn from the employer's conduct is that it wants the vote on its offer among the employees to be a vote of non-confidence in the union so overwhelming as to effectively terminate the union's bargaining ability, if not its bargaining rights.'

In *Selinger Wood Limited*, [1980] OLRB Rep. Nov. 1688, the Board found that the employer's refusal to execute a collective agreement which it believed had not been properly ratified violated section 14 of the Act. Finally in *Fotomat Canada Limited, supra*, the employer, as part of a final offer, included a clause requiring employee ratification of its offer. However, the trade union accepted the offer. The employer in turn took the position that 'ratification is a necessary and required prerequisite to the proper execution of the collective agreement in question.' The Board, in finding that the employer had breached the then sections 14, 46 and 58, stated:

'13. Part IV of the respondent's proposal is a clear attempt to reach around the exclusive bargaining agent and deal directly with bargaining unit employees. This is its obvious effect. Such conduct violates sections 14, 56 and 58 of *The Labour Relations Act*. As the United States Supreme Court held in *NLRB v. Borg-Warner Corp.* (1958), 356 U.S. 342, 42 LRRM 2034 at 2037 (per Barton J.), this type of proposal 'substantially modifies the collective bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with statutory representative.'

16. We also find that the ratification proposal is not a proper subject of collective bargaining negotiations and the respondent's insistence on this aspect of its proposal contravened sections 56 and 14. Employees ratification is an internal trade union affair. There is no statutory requirement that such procedures be adopted, although the good sense lying behind the concept of ratification has been commented on by this Board in the past and is well understood in the industrial relations community....

18. Finally, we find that the respondent's purpose in proposing Part IV was to provide the bargaining unit employees with an opportunity to reject or accept *the complainant* trade union and not the proposed contract. It is simply non-sensical for an employer to request such a procedure when the bargaining agent has already expressed its intention to accept the contract. What is the more likely reason for insisting on employee ratification in such circumstances?

Is the employer genuinely concerned that the contract is not sufficiently attractive or 'rich' to be acceptable to the employees?

(emphasis added)"

As indicated earlier in this decision, we are satisfied that the respondents added to their proposals a demand that they be taken to the membership for ratification in order to avoid entering into a collective agreement with the complainant when it became apparent to them that Mr. Reilly had been given the authority to enter into a collective agreement on behalf of the complainant and was ready, willing and able to do so at the mediation session on June 6, 1983. Thus, by including in its "final offer" a demand that the offer "be taken to [the complainant's] membership for ratification", the respondent employer further contravened section 15 of the Act in the circumstances of this case.

34. Section 40 permits an employer to put his last offer before the employees in the bargaining unit, but this can be done only once and cannot be used as a means of avoiding the section 15 duty to bargain in good faith and make every reasonable effort to make a collective agreement. (See *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583, for a discussion of the "inevitable inter-relation" of sections 15 and 40.) In the instant case, the respondents arranged to have the mediator deliver their "final offer" to the complainant's representatives, together with an announcement of their intention to apply for a section 40 vote. The respondents then left the premises without giving the complainant any opportunity whatever to discuss that offer with them, or to accept or otherwise reject it. As noted above, one of the principal functions of section 15 is to foster rational, informed discussion between the parties with a view to avoiding unnecessary resort to economic sanctions. The employer has an ongoing duty under section 15 regardless of section 40 (see *Canada Cement Lafarge Ltd.*, *supra*, at paragraph 23). How can it be said that an employer is bargaining in good faith and making every reasonable effort to make a collective agreement when it breaks off negotiations and applies for a section 40 vote without giving the union an opportunity to discuss the final offer with the employer, and to accept or otherwise respond to it? It is implicit in section 40, read in the context of the Act as a whole, that the union must be given an opportunity

to consider, discuss, and respond to "the offer of the employer last received". If the union found such offer to be acceptable, then there would no longer be any "matters remaining in dispute between the parties" and, accordingly, no vote would be required, or available, under section 40. By terminating its negotiations with the complainant and applying for a section 40 vote before affording the complainant any such opportunity, the respondent employer further demonstrated its lack of good faith and its failure to make every reasonable effort to make a collective agreement. Thus, we find that the respondent employer contravened section 15 of the Act by applying for a section 40 vote in the manner in which it did in the circumstances of this case.

35. Had the respondent employer given the complainant an opportunity to consider, discuss, and respond to its "final offer", the complainant would have accepted all of the items included in that proposal except the two items which we have found to be incapable of being legally pressed to impasse, namely, the respondent employer's "revised" check-off proposal, and its demand that the package be taken to the membership for ratification. Moreover, the complainant's acceptance of those items would have been communicated to the respondents at the (June 6, 1983) mediation meeting if they had not prematurely departed from that meeting without giving the complainant any such opportunity. At the hearing of this matter, Mr. Reilly confirmed in his sworn testimony that, with the exception of those two "illegal" items, the respondent employer's "final offer" is acceptable to the complainant, which is prepared to enter into a collective agreement with the respondent employer on those terms, together with the other items previously agreed upon by the parties. Moreover, the complainant contends that this is an appropriate case in which to direct the respondents to execute such collective agreement. In *Treco Machine & Tool Limited*, *supra*, the Board reviewed the approach which it has adopted in that regard as follows:

"18. The Board has been asked to direct the employer to enter into a collective agreement. The Board has consistently recognized that the principle of voluntarism underpins the collective bargaining process established under the Act and has, therefore refused to direct the execution of a collective agreement where there is not a complete understanding between the parties. In the absence of a complete understanding, the Board would be required to impose terms if it was to direct that a collective agreement be executed and this it has refused to do. (See *Lake Ontario Steel Company Limited*, [1979] OLRB Rep. July 671, *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309, *Graphic Centre (Ont.) Inc.*, [1976] OLRB Rep. May 221. However, where the evidence establishes that all outstanding issues between the parties have been resolved, the Board has not hesitated to direct the execution of a collective agreement in the exercise of its remedial authority. (See *Coulter Copper & Brass Limited*, [1981] OLRB Rep. May 519, *Fotomat Canada Limited*, *supra*, *Wilson Automotive*, *supra*, *Selinger Wood*, *supra* and *Municipality of Casimir, Jennings and Appleby*, *supra*.)"

In the *Treco* case, the Board directed the employer to execute a collective agreement which contained all of the language to which the parties had agreed "exclusive of the unlawful ratification clause". By analogy, we find it appropriate in the present



circumstances to direct the respondent employer to forthwith prepare, execute, and forward to Mr. Reilly for execution by the complainant, a collective agreement which embodies all of the language to which the parties agreed at or before the June 6, 1983 collective bargaining session (including Article 4.02 in the form earlier agreed upon by the parties) and the further provisions proposed by the respondent employer in its "final offer" which the complainant has found to be acceptable, with the exception of the two items which, for the reasons set forth above, cannot lawfully be pressed to impasse by the respondent employer. We are satisfied that, but for the respondent employer's contraventions of section 15 of the Act, a (one year) collective agreement would have been signed on June 6, 1983 at the aforementioned meeting. Accordingly, we hereby further direct that the collective agreement be made effective from that date, and that the terms and conditions contained therein be applied to the employees in the bargaining unit forthwith.

36. In order to inform bargaining unit employees of the disposition of this case, and to provide them with an assurance that in the future the respondents will abide by the requirements of the *Labour Relations Act*, we further direct that the respondent employer post copies of the attached notice marked "Appendix", after being duly signed by an authorized representative of the respondent, in conspicuous places on its premises where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent employer to ensure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent employer to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with.

37. As indicated above, the Board has found that, with the exception of the two aforementioned items which cannot legally be pressed to impasse by the respondent employer, there were no "matters remaining in dispute between the parties" at the time that the respondent employer requested a section 40 vote. Moreover, we have found that the respondent employer contravened section 15 of the Act by applying for a section 40 vote in the circumstances of this case. Accordingly, the respondent is not entitled to have such a vote taken. For a discussion of the purpose and scope of section 40, see *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. Sept. 1337, at paragraphs 9 - 16. In that decision the Board held that where there are no matters remaining in dispute between the parties, the employer has no right to request a vote under section 40:

"15. Since the purpose of section 34e [now section 40] is to minimize unnecessary conflict, it is not surprising that the condition precedent to its operation is the appearance of conflict between the parties as to the terms of the collective agreement that they are in the course of bargaining. That is clear from the words of the section:

... the employer ... may request that a vote be taken as to the acceptance or rejection of the offer of the employer ... *in respect of all matters remaining in dispute between the parties* ..."  
[emphasis added]

16. In the instant case the employer has requested that a vote be taken where there are no matters remaining in dispute between the

parties. The employer and the union are agreed on each and every term of the collective agreement. In these circumstances the Board must conclude that the employer is not relying on any right which it has under the Act when it grounds its refusal to sign the agreement of the fact that it awaits the taking of a vote of the employees by the Minister under section 34e of the Act..."

Furthermore, since the respondent employer's compliance with the Board's order in this matter will result in a collective agreement between the complainant and the respondent employer (effective June 6, 1983) irrespective of the outcome of any vote taken under section 40, no useful purpose would be served by conducting such a vote in the circumstances of this case.

38. The Board remains seized of this matter in the event that any dispute arises concerning the interpretation or implementation of our order.

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**1278-82-U Joe Portiss, Complainant, v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, Respondents**

**Damages - Duty of Fair Referral - Practice and Procedure - Remedies - Trade Union - Unfair Labour Practice - No undue delay to cause Board not to inquire - Hiring hall rules not posted or communicated - Out of work list disregarded - Preferential treatment accorded to some members - Records falsified - Violation found and extensive remedies directed against union**

**BEFORE:** Michel G. Picher, Vice-Chairman, and Board Members I. M. Stamp and W. F. Rutherford.

**APPEARANCES:** *Brian Iler, Patricia Wells and Joe Portiss for the complainant; A. M. Minsky and R. D'Andrea for the respondents.*

**DECISION OF THE BOARD;** July 11, 1983

1. Joe Portiss is a labourer. He brings this complaint under section 89 of the *Labour Relations Act* alleging that his union and its officers have violated his rights in the administration of the union's hiring hall in Sarnia. He maintains that work assignments have been distributed from the hiring hall in a way that is arbitrary, discriminatory and in bad faith contrary to section 69 of the *Labour Relations Act*. He also alleges that the union and its officers have brought intimidation and coercion to bear against him contrary to section 70 of the Act.

2. The relevant sections of the Act as are follows:

69. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

3. The hearing in this matter extended over some twelve days and involved a detailed review of the constitution and practices of the respondent local as well as the actions of its officers in respect of a number of impugned referrals of work. Before dealing with the referrals which Mr. Portiss alleges were wrongful it is necessary to briefly set out the background and context in which they occurred.

4. The union holds bargaining rights for labourers under a number of collective agreements, including the Provincial Agreement governing the industrial, commercial and institutional sector of the construction industry, as well as individual agreements in other sectors including the sewer and water mains sector, the road sector, the pipeline sector and the electrical power systems sector. Under virtually all of its agreements its members obtain work by referral from the union's hiring hall. Local 1089 is the Sarnia branch of the Labourers' International Union of North America, one of the largest of the construction unions, whose headquarters are in Washington, D.C.

5. Local 1089 is, subject to the constitution of the international union, autonomous in its local affairs. While the association is ultimately governed by the will of its members, the day-to-day affairs of the local are under the direction of an executive board elected from among the membership. Also elected is the local's full-time business agent, the respondent Rocco D'Andrea. While Mr. D'Andrea is accountable to the executive board, and ultimately to the general membership, the evidence establishes plainly that it is under his authority that day-to-day decisions are made respecting the administration of virtually all of the affairs of the local. The operations of the local's hiring hall are entirely under Mr. D'Andrea's direction.

6. The hiring hall is a significant component in the administration of employment in the construction industry. Before the advent of unionism employment in the construction industry was not methodical, often being governed at the whim of employers and their personnel agents. Without the hiring hall employees, notably in the construction industry and the maritime industries, were too frequently the victims of abuse and arbitrary treatment at the hands of employers. (See, generally *Hearings On Hiring Halls In The Maritime Industry*, Sub-Committee On Labour Management Relations Of Senate Committee On Labour And Public Welfare, 81st Cong. (2d) ses. 100-01 (1950) and Bastress, "Application of a Constitutionally Based Duty of Fair Representation to Union Hiring Halls [1982] West Virginia Law Review 31). If they are operated fairly hiring halls provide an equitable and efficient means to distribute jobs, particularly in industries where jobs are temporary and manpower needs fluctuate. In these situations the union is well suited to act as an employment agency.

7. The hiring hall offers advantages to both employees and employers. It saves the employee from the need to canvas numbers of employers in an often fruitless search for work, acting as a clearing house in which available jobs and available workers can be



matched. Particularly in periods of high unemployment it also provides the worker with a rational and objective system for the more equitable distribution of work among all employees rather than to the privileged few. The employer gains to the extent that the hiring hall relieves him of the need to screen and recruit employees with adequate qualifications for short term jobs. The employer avoids the administrative cost he would otherwise bear as well as incidental costs which he might have to incur to retain a crew of workers through slow periods to insure available manpower in busier times. A well run hiring hall will give the employer a ready pool of labour from which he can draw on short notice with little or no administrative cost. Moreover, to the extent that the hiring hall dispatches the same members to different kinds of jobs for different employers, as is notably the case for labourers, it may engender a work force with greater experience and sophistication, which will also benefit the employer.

8. To the extent that the hiring hall functions as an employment agency it vests considerable power in the hands of union officers in charge of its management. Through the administration of hiring hall rules, including the determination of qualifications and classifications of employees, the union officer in charge of a hiring hall has a substantial degree of control over the employment opportunities of union members. The hiring hall system effectively vests in those union officers powers and prerogatives which were previously associated with an employer. Control over the employment opportunities of hundreds, and sometimes thousands, of union members involves the exercise of a considerable amount of power over their lives. By the enactment of section 69 of the Act the Legislature introduced certain minimal safeguards against abuse of that power.

9. The advantages of the hiring hall system and the potential for their abuse were well summarized by Professor Bastress in the following passage at page 31:

The union hiring hall has been one of the major developments in twentieth century labor relations. It has provided many industries with a means of efficiently matching unemployed workers with job vacancies and has replaced a system of haphazard, unjust, and corrupt employment practices. Yet it has also developed substantial problems of its own. A hiring hall is fraught with potential for abuse, and, indeed, that potential is all too frequently realized. The largely unreviewable discretion of union business agents and inadequate protection for workers can combine to make hiring halls a mixture of whim, nepotism, prejudice and irrationality.

10. Unfortunately Canadian labour relations have not been without some degree of abuse, albeit exceptional, in the hiring hall system. (See, Robert Cliche, Brian Mulroney, Guy Chevrete, *Report of the Commission on the Exercise of Union Freedom in the Construction Industry*, Quebec, (1975); Waisberg, *Report of the Royal Commission on Certain Sectors of the Building Industry*, ("The Waisberg Report") Ontario, (1974) at pp. 326-28; see also the recent decision of the Supreme Court of Canada in *Nauss v. Halifax Longshoreman's Association, Local 269*, 83 CLLC ¶14,022 (S.C.C.)).

11. The hiring hall practices of Local 1089 disclosed in this case give the Board great concern. The evidence establishes that there were no hiring hall rules posted or provided to the members, copies of collective agreements were not provided, and



members who requested copies of the union's constitution were told that none were available. Apparently the membership was told that constitutions could only be obtained if a sufficient number of members signed a list and paid for copies, which would apparently come from Washington only if there was a sufficient number of requests.

12. Notwithstanding the substantial evidence of questionable practices adduced in the case of the complainant the respondents Rocco D'Andrea and Local 1089 called no evidence. There is therefore no direct evidence of union hiring hall rules before the Board. A document, purporting to be rules adopted as of August 16, 1978 was filed by the respondents during the cross-examination of union member Ronald Neathway. While Mr. Neathway and other witnesses acknowledged that it seemed to generally outline what they understood to be the hiring hall rules, there is no direct evidence to establish whether these rules were ever formally adopted.

13. During the testimony of union member William Willis, the recording secretary of the local from 1977 to 1981 who testified on behalf of Mr. Portiss, the respondents filed an entry in the minute book of the executive board of the union in respect of a meeting purportedly held on September 11, 1978. Mr. Willis was not present at that meeting and the minutes were recorded by Mr. D'Andrea as acting secretary. The last paragraph of the minutes appears to record an adoption of the written rules of August 16, 1978 filed with the Board. It would also appear that at a subsequent general meeting on November 9, 1978, by way of a motion to accept the minutes of the prior executive meeting, the general membership purportedly adopted the hiring hall rules. Mr. Willis, however, had no direct recollection of any discussion of the rules at the general meeting. He was firm in his evidence that he had never before seen the rules filed by the respondents in any written form. We accept Mr. Willis' evidence and are therefore left with no direct evidence from any union officer or union member satisfactorily explaining the adoption of the purported hiring hall rules. No union member who testified stated that he ever saw the rules in any written form.

14. The document filed by the respondents is as follows:

1) It is each members' [sic] responsibility to keep himself informed as to the availability of work through the Union Office.

2) It is each member [sic] responsibility to see to it that the union has accurate and up to date records of his address and phone number for job referrals.

3) Upon receiving a job order from the employer, the union will attempt to contact the member for a maximum of 2 (two) hours at an interval of 15 (fifteen) minutes between phone calls.

4) If the union was not able to contact that member after 2 (two) hours, he will be considered "Not Available".

5) Members who are not available for job referrals will be placed on the bottom of the out of work list upon their request.

- 6) Members who refuse a job upon notice will wait 7 (seven) regular days before being allowed to resume a position on the bottom of the Out of Work List.
- 7) In both instances in which a member is either not available or refuses, the union will not place that member's name on the bottom of the list until instructed to do so, by the member.
- 8) Jobs placed by employers on the basis of classifications as per our various collective agreements will be treated specially by the Business Manager, in that he will call on members or prospective members with the specific classifications or skills in which the Employer requires, to the best of his abilities.
- 9) It is each member's responsibility to see to it that his special skills or classifications are registered next to his name at the time of placing his name on the Out of Work List.
- 10) The Business Manager may disallow any member's claim to certain classifications or skills if he finds through proper investigation that the members does not truly hold such skills or classifications. Each individual case will be based on its own merit.
- 11) Any member who is referred to a job and is not alled [sic] the opportunity to work 24 (twenty-four) accumulative hours from more than 1 (one) employer will be placed back on the top of the list upon proof of termination due to shortage of work.
- 12) Any member who cannot work when notified by the Local Union due to illness or injury must supply the union office with a certificate from his/her physician, verifying the reasons why he cannot work.
- 13) Before a member is able to resume normal work assignments or referrals, that member must furnish the Local Union Office with a doctor's certificate verifying that he is now willing and able to go back to work. After waiting 7 (seven) regular days upon presentation of the doctor's certificate the member will then be so referred to by the Local Union or as soon as work becomes available.
- 14) Members accepting a job referral slip and then failing to report to work as directed without a just cause will be considered as having quit that job.
- 15) Member who quit, ask for lay-off, or are fired for no just cause will be subject to a 7 (seven) regular day wait before they can notify the union to place their name on the bottom of the Out of Work List.
- 16) Members abusing the referral system by giving or selling their referral slips to another member or person will be disqualified from

further job referrals for a period of at least 3 (three) months and may be subject to further disciplinary action as/and if recommended by the Executive Board.

17) The Business Manager, after consideration and study of a particular case or situation and when he believes it necessary to fully accomplish an object of purpose of the Local Union and members, may grant variances, tolerances or exceptions from these specific provisions.

18) Members who obtain a job referral slip by falsifying employment information will be removed from the job referred to and further will be disqualified from receiving a job referral slip for a period of 3 (three) months and will be subject to disciplinary action as/and if recommended by the Executive Board.

19) Unemployed elected officers of the Local Union may have preference for job referrals falling within their skills and classifications.

20) Unemployed member who are out of work for a period of at least twelve months have exhausted their employment insurance benefits may receive special consideration.

21) Employers recalling specific members shall be treated as per their Collective Agreement.

15. While no one could identify the rules advanced by the respondents there was a consensus among the witnesses called by the complainant that the above document generally reflected some of the accepted procedures in the hiring hall for a number of years. The evidence does not, however, confirm that there was any clear knowledge or agreement among the union's members as to the skills or classifications which could be used for registration purposes on the out of work list. Nor did any member who testified have knowledge of the provision giving the business manager absolute discretion to depart from the rules in specific cases. Mr. Willis, who had been an officer for some years, also testified that he was never aware of any provision whereby unemployed elected officers had preference for job referrals. The Board is in substantial doubt as to whether the written rules filed by the respondents were ever adopted as suggested in August of 1978. More importantly, if they were, it is beyond dispute that they were never posted or otherwise communicated to the union members whose access to a livelihood was regulated by them.

16. The evidence shows substantial confusion in the minds of the general membership regarding special classifications of members for the purposes of job referrals. It appears to have been generally understood that certain skills merited a classification on the out of work list which would give the qualified individuals preference in work referrals to employers who requested employees with the skills in question. It appears to be common ground that foremen, working foremen, tool crib tenders, acetylene burners and cement finishers were all positions for which employees, if qualified, could register in the out of work book. Other positions fall into a grey area where it appears that some

members believed that they constituted a recognized qualification while others did not. These would appear to include, among others, carpenter or carpenter's helper, vibrator man, pipelayer, and fork lift operator.

17. As with the hiring hall rules, no breakdown of specialized classifications was ever provided to the general membership. It appears that no qualification committee or process was ever established to determine which jobs or skills merited special classification. Nor was anything done to regulate the qualification or registration of employees for them. The lack of any clarity in the classification system and the use of that system as disclosed in the evidence by the union's officers generated enormous suspicion and discontent among the membership of Local 1089. A segment of the membership have become convinced that the hiring hall classification rules have been deliberately manipulated by the respondent Rocco D'Andrea and other union officers for the advantage of some members and to the detriment of others in ways that have been arbitrary, discriminatory and in bad faith. The evidence before the Board gives ample ground for those suspicions.

18. Counsel for the respondents raised a preliminary objection to the complaint on the basis of timeliness. He maintains that the allegations, the earliest of which date to the spring of 1981, should not be entertained because of undue delay. The complaint was filed on October 8, 1982. The evidence of Mr. Portiss establishes that for a number of months prior to the filing of his complaint he had attempted, without success, to obtain legal aid to support the preparation and litigation of his case. His efforts in that regard involved protracted applications and appeals through the legal aid system at both the local and provincial level as well as appeals for assistance to members of the Legislature. The evidence of Mr. Andrew King, a solicitor employed in the office counsel for Mr. Portiss, establishes that a legal aid certificate was finally issued in respect of Mr. Portiss' complaint on July 16, 1982. Thereafter, under the direction of Mr. Iler, Mr. King began a fairly extensive factual investigation the progress of which was somewhat delayed by the hospitalization of Mr. Portiss in Toronto in August of 1982. After a final investigatory trip to Sarnia on September 18, 1982 Mr. King proceeded to draft the complaint. A first draft was completed on October 1, 1982 and the complaint now before the Board was filed on October 8th, some seven days later.

19. In these circumstances the Board sees no reason to dismiss the complaint on the basis of undue delay. The evidence establishes that Mr. Portiss has pursued his rights with diligence and determination. Having filed prior complaints against the respondents before the Board Mr. Portiss was aware that success in the litigation of complex facts and law would in all likelihood depend on the assistance of qualified legal counsel. Earlier complaints which he had filed with the Board were withdrawn in part because of his perceived difficulty in proceeding on his own. The length and complexity of the hearing confirmed the accuracy of Mr. Portiss' perception. In these circumstances the Board cannot fault him nor should it circumscribe his right to have this complaint heard. He did everything possible to bring this matter to a full and meaningful hearing, at the expenditure of considerable time and effort. There is, moreover, no substantial prejudice to the respondents. The allegations which have been particularized in respect of job referrals which Mr. Portiss alleges were contrary to section 69 of the Act are all matters of record within the documents of the union. This is not a situation where the evidence has become stale or the preparation of the respondent's case would be seriously hampered by fading memories.



20. Counsel for the respondents also complained about the filing of additional particulars after the commencement of the hearing, raising in essence the same grounds of delay. It is difficult to sustain the respondents position on that issue. It is a matter of record that up to the first day of hearing in this complaint the union refused to permit Mr. Portiss or his counsel to see any of the hiring hall records. The additional allegations emerged only after those records were made available to the complainant on the first day of hearing at the suggestion of the Board. In these circumstances we are not inclined to give much weight to the protestations of counsel for the respondents that the complaints were unduly delayed or that, as he argued at the end of the day, were hurriedly prepared without adequate particularity. We are satisfied that the complainant has acted with reasonable diligence throughout in the pursuit of this complaint. It should be determined on its merits.

21. The complainant Joe Portiss is a thirty-one year old labourer with a Grade 11 education. He joined Local 1089 in 1974 and since 1975 has worked as a labourer through the hiring hall of the local in the Sarnia area. His first conflict with the administration of the hiring hall arose over a dispute as to his qualifications to register under the classification of foreman. Beginning in 1976 he was employed on a long term basis, for some three years, with Douglas Chalmers Construction in Sarnia. Mr. Portiss was the union steward on the job and was eventually assigned the duties of foreman which he performed on and off over the three years of employment with Chalmers. The Board accepts Mr. Portiss' evidence that the assistant business agent and president of the union, Mr. Orfeo Iacobelli, was aware that Mr. Portiss worked as a foreman for Chalmers. On June 4, 1979 Mr. Portiss was laid off because of a work shortage. When he registered in the out of work book at the hiring hall of Local 1089 he asked the secretary to be registered as a foreman. She advised him that he must speak with either Mr. Iacobelli or the business manager, Rocco D'Andrea. Upon speaking with Mr. Iacobelli, Portiss was advised that he would need a letter of reference from Chalmers confirming that he had acted as a foreman. Portiss then requested a letter be sent from Chalmers and was told by Mr. Dawkins, assistant manager for the company that a letter had been forwarded to the union. Mr. Iacobelli later took the position that no such letter had been received. Nothing was in fact done to establish Mr. Portiss' status as a foreman and he took the view that the classification had been wrongfully denied to him by D'Andrea and Iacobelli, both of whom he maintains were aware of his experience as a foreman. Mr. Portiss believed from that time on that D'Andrea and Iacobelli were deliberately keeping him from entry to the foreman's classification.

22. On November 24, 1980 Mr. Portiss was again laid off from employment and registered in the out of work book, indicating at that time that he was qualified as a "burner", the designation for a labourer with skill and experience in the use of a cutting torch. The out of work book, filed in evidence, reveals that the classification "burner" was inserted next to his name at that time. He remained out of work until the following spring when he was referred to J. Joose Construction on April 28, 1981.

23. The material before the Board indicates that the complainant should have been referred work several days before April 28th. The evidence establishes that on approximately April 21st four new employees were dispatched to a construction site for Mortell, Cove, Lumley Ltd. Prior to the assignment of those men Mr. Portiss stood number six on the work referral list. When he checked the list again, after their referral, he was advised that he still stood number 6. In other words four employees were referred

for work but the list had not moved. The Board accepts the evidence of Mr. Portiss that the work at Mortell, Cove, Lumley Ltd. was pipeline work which he had previously performed and for which he was qualified. It appears that in that case the employer had not been satisfied with the employees who were first referred from the hiring hall and that in selecting substitutes Orfeo Iacobelli, the person responsible for the day-to-day supervision of the hiring hall procedures, chose four other members without regard to the list. There is no evidence before the Board to rebut the testimony of Mr. Portiss, supported by the evidence of Ronald Neathway, one of the employees who had worked on the project for a day, that the work involved was within Mr. Portiss' experience and abilities and that it could, in any event, be learned by any labourer within an hour. That incident caused Mr. Portiss to inquire about his rights. He called the solicitor's office of this Board. On June 7, 1981 he filed a complaint under section 69 of the Act.

24. Mr. Portiss subsequently withdrew his complaint when it was later explained to him by Mr. D'Andrea that the Mortell, Cove, Lumley Ltd. project was under the ICI collective agreement and that in those circumstances the business agent had the discretion to bring in employees from out of town, as was done in that case. Mr. Portiss accepted that explanation and ended his complaint. Subsequently, however, and in the evidence in this case, it became clear that there was no such discretion.

25. The Board is satisfied that in this instance the hiring hall procedures were disregarded to the prejudice of Mr. Portiss. He then held No. 383 on the hiring hall list and had been out of work since November 24, 1980. Two of the employees referred ahead of Mr. Portiss were Alistair Putt and Fred Gillan, both of whom had been out of work since December 8, 1980 and were registered as numbers 456 and 455 respectively. The respondent union called no evidence to establish any reason for the preferential referral of those two members, nor did it establish that the work in question was beyond the abilities of Mr. Portiss or any of the five members who preceded him on the list. Absent any explanation, and in the light of other evidence canvassed below, we conclude that the assignment was made arbitrarily by the officers responsible for the hiring hall, specifically Orfeo Iacobelli and Rocco D'Andrea.

26. By further way of background, it should be noted that at or about the same time as his dispute over the Mortell, Cove, Lumley Ltd. referral Mr. Portiss got involved politically inside Local 1089. He ran unsuccessfully for executive office in the local along with a number of other members who became candidates in opposition to Mr. D'Andrea and the officers who were associated with him.

27. The second allegation concerns the referral of member Cliff Fletcher to Collavino Construction on or about July 2, 1981. Mr. Fletcher was registered in the out of work book as number 143 on June 30, 1981. He was qualified as a general foreman, as was Mr. Bill Willis who had registered before him as number 140. The evidence establishes that Mr. Fletcher was able to move through two job referrals in the space of a few days. Mr. Fletcher's evidence and his work card establish that he quit Insko Construction on June 18, 1981. Under the hiring hall rules he would then have been required to wait seven days before resuming a position at the bottom of the out of work list. In fact, at that time, Mr. Fletcher was not put on the out of work list at all. He was referred immediately to a job at Collavino Construction, apparently as a vibrator man with the possibility of working as a foreman in the future. By Mr. Fletcher's account he

didn't place his name on the out of work list because the list was short and moving quickly at that time and he was under the understanding that there were no foremen out of work. When it appeared to Mr. Fletcher that he was not going to like working at Collavino Construction because he could not get along with the superintendent he asked for and was given a "lay-off" after one day. He was immediately referred out again to Combustion Engineering Limited on July 2, 1981 as a general foreman. Mr. Fletcher's work card reveals that he was referred to Combustion Engineering on that date and that he was laid off from that job on August 7, 1981. The hiring hall out of work book, however, shows something quite different. It records Mr. Fletcher as having been referred to Combustion Engineering on August 10, 1981, a date which would not indicate that he had been given preferential treatment. No evidence was adduced by the union to explain why Mr. Fletcher was referred ahead of other qualified foremen, including Mr. Willis, or to explain the apparent falsehood in the referral date recorded in the out of work book.

28. The Board concludes that Mr. Fletcher, for reasons undisclosed, was given preferential treatment in his job referrals. The apparent and unexplained falsification of the date of his referral to Combustion Engineering in the hiring hall out of work book raises an unanswered inference that the records were structured to conceal the fact that he was referred to a general foreman's job some six weeks in advance of other qualified members whose stood ahead of him on the out of work list. Nor does Mr. Fletcher's suggestion that the list was current offer a satisfactory explanation. The out of work list shows that some seventeen members registered as out of work on June 26, 1981 were not referred until on or after August 7, 1981. Two of them were registered as foremen with earlier registry numbers than Mr. Fletcher.

29. It appears that Mr. Portiss was also referred to the Combustion Engineering job as a foreman on July 2, 1981. Mr. Portiss registered as number 74 in the out of work book on June 23, 1981. He had been up to that point unsuccessful in obtaining any referrals as a foreman since June of 1979. Portiss was apparently then registered as both a burner and a foreman on the out of work list. He did not, however, receive the referral to Collavino Construction which had been given to Fletcher during the time Portiss' complaint before the Labour Board was outstanding even though he preceded him on the list. On July 2, 1981 when Portiss gave Mr. D'Andrea a written withdrawal of the section 69 complaint he was immediately referred to Combustion Engineering as a foreman along with Mr. Fletcher. While counsel for the union argued that the referral to Collavino Construction was based on Fletcher's ability as a vibrator man, and the Board accepts the evidence of Mr. Fletcher that some individuals are more skilled than others in vibrating cement, there is no direct evidence to establish that that was the union's motive or that its officers believed in good faith that Mr. Portiss was unable to do that job. The only evidence before the Board is the un rebutted statement of Mr. Portiss that he could.

30. When the Combustion Engineering job got under way the complement of foremen was reduced and Mr. Portiss was reduced to the status of a general labourer. As Fletcher had done at Collavino, Portiss then asked for and obtained a "lay-off" on July 13, 1981. In contrast to Mr. Fletcher, however, he re-entered at the bottom of the out of work list on that date as number 228. He again registered as a burner and foreman with the additional designation of carpenter's helper. He was next referred to Rankin Construction on August 19, 1981.



31. It is plain from these facts that Mr. Portiss was no less willing than others to bend the hiring hall rules to his own advantage when he could. He plainly quit Combustion Engineering and should have been forced to wait seven days before registering in the out of work list, as the list was not then current with outstanding referrals. The fact that Mr. Portiss voluntarily left his job at Combustion Engineering must, therefore, be weighed both in respect of any compensation that might issue if a violation of the Act is established. It may also have a bearing on the merits of any complaint that he was subsequently prejudiced and his treatment on the out of work list.

32. The complaint also alleges that new members were referred to work without registering on the out of work list and waiting their turn. On July 2, 1981 when Mr. Portiss attended at the hiring hall he noticed three women speaking with business agent D'Andrea. One of women, Ms. Trudy Seabrook, told Mr. Portiss that they were there to pay their union dues. A second, Ms. Cathy Downie told him that Mr. D'Andrea had advised her to come to the hiring hall and that he would get her a job. The work card for Ms. Downie establishes that she was referred to Rankin Construction on July 2, 1981, although the same card indicates that she joined the union on July 30, 1981. That is the same date indicated for the entry into membership of another woman, Gieseppa Di Bona who was also referred to Rankin Construction on July 2, 1981. The evidence establishes that while Di Bona and Downie were dispatched to jobs on July 2, 1981 they were never entered on the out of work list and were apparently assigned work in preference to numbers of members on the list some of whom, for example, went on the list in the last week of June and were not referred out until the last week of July. If the referral of these women was intended as affirmative action to redress the apparent absence of women in the union previously, it appears to have been done in disregard of the hiring hall rules and, most importantly, apparently without the knowledge or approval of the general membership.

33. A similar occurrence took place later in July. The evidence establishes that on July 28, 1981 Ms. Debbie Smith and Ms. Kathryn Reid, who had not previously been members of Local 1089 and who were not on the out of work list, were dispatched to Bravo Construction which was engaged in pouring concrete for the new Eaton's Centre. The Board is satisfied on the evidence that Mr. D'Andrea used Ms. Smith and Ms. Reid, neither of whom had any prior experience in construction work, as a ploy to force the hiring of labourers on a more sustained basis at the Eaton's Centre project. It appears that Bravo was pouring concrete only one day a week, thereby releasing its labourers only after a few hours of work.

34. While the two women who were dispatched apparently did a creditable job raking cement in extremely hot and difficult working conditions, their referral was not so much affirmative action as a means for Mr. D'Andrea to force the contractor at the Eaton's Centre into patterns of work scheduling more favourable to Local 1089. It is a fair inference that none of the members of Local 1089 would have wanted the referrals to Bravo because they involved only one day's work each week in the peak of the construction season. No evidence was adduced, however, to establish that new members or any other class of members could be singled out for such assignments or that those who were at the head of the out of work list could be passed over for members who were not on the list at all. While we accept that on occasion flexibility and discretion are necessary to respond to the give and take of events in the construction industry, we must



register concern that no acceptable proof was made of a hiring hall rule giving such discretion to the business agent and, just as significantly, no attempt was made to explain these or any other irregular referrals to the general membership.

35. The allegations made by Mr. Portiss are to a great extent tied to the hiring hall's job classification scheme. The haphazard nature of the local's job classifications are illustrated in the next event in evidence. While working at Rankin Construction in August of 1981 Mr. Portiss met fellow member Cam Gordon. They discussed the classifications affecting the hiring hall procedures and in the course of their talk Gordon indicated to Portiss that he had once driven a fork lift. Portiss then suggested to him that he should list "fork lift operator" as a special skill when he next registered in the out of work book.

36. On July 14, then out of work, Gordon registered a number 248 on the hiring hall list, requesting that the designation "fork lift" be put next to his name, which was done. Portiss, who also had fork lift driving experience, was then registered ahead of Gordon as number 228 but without that designation. It is common ground that his ability with the fork lift was not known to the union. On August 6, 1981 the union received a request for a fork lift driver from Collavino Construction and Mr. Gordon was then referred out for work. Mr. Portiss did not obtain a referral until August 19, 1981.

37. We agree with counsel for the respondents that Mr. Portiss should not be heard to complain on the merits of that incident when he did not advise Local 1089 of his own special skills with a fork lift. The incident, however, raises concern in that it illustrates the amorphous nature of the classification system employed in the hiring hall. Prior to Mr. Gordon's entry on July 14, 1981 there appears to have been little, if any, general knowledge among the membership that "fork lift" was a classification which could result in a preferential referral. His referral out of turn to a fork lift operator's job had more to do with chance than with the operation of an informed and rational system.

38. The next incident, involving Mr. Oreste Gagliardi, illustrates perhaps better than any the importance of a rational and fair referral system and the anger and frustration which can arise when members feel they have been victimized by disregard of the hiring hall rules. Mr. Gagliardi is a middle-aged man with many years experience as a labourer. He joined Local 1089 in 1968. His son, Salvatore Gagliardi, is also a member.

39. Like most members of the local, Mr. Gagliardi values job referrals to long term assignments and projects. In 1974 and 1975 he had an assignment which lasted one year. Later, he held a position with Foster Wheeler Construction which apparently lasted for some two and a half years between 1976 and 1979. On February 2, 1981 he registered in the out of work book as number 647. On May 8, 1981 he was referred to Tileman Construction at the Petrosar project. While he registered, among other things, as a cement finisher and carpenter, by Mr. Gagliardi's own evidence he was not dispatched pursuant to any special classification. His work at Tileman consisted of mixing mortar for bricklayers. On the material before the Board it appears that Mr. Gagliardi was referred substantially out of turn to the Tileman job. The dozen or so members immediately before and after him on the out of work list were not given job referrals until June 4 and June 5, 1981, almost a month later. More importantly, by his job referral on May 8, 1981 Mr. Gagliardi passed ahead of more than 100 members on the out of work list, some of whom had been jobless since early December of 1981.

40. According to Mr. Gagliardi's testimony because of a shortage of brick he was laid off after a few weeks with Tileman. He registered on the out of work list as number 144 on June 30, 1981. He then indicated the classifications cement finisher and pipelayer, as did Mike Gabriele, who registered immediately after him as number 145. According to the hiring hall rules, therefore, Mr. Gagliardi could expect to be referred ahead of Mr. Gabriele. On July 14, 1981 both Gagliardi and Gabriele were referred to new jobs. Gabriele was referred to Alvaro Construction at the M.H.G. project, to a job which was expected to last a long time. Gagliardi was dispatched to Instarek Construction on the same project to a job that only lasted some four days. Gagliardi was extremely angry because he believed that a person below him on the list, Gabriele, had been wrongfully given the referral to the better job with Alvaro Construction.

41. According to the hiring hall rules Mr. Gagliardi should have returned to the bottom of the list after working four days at Instarek Construction. It appears, however, that his work was terminated because of a jurisdictional dispute with the local of the Operative Plasterers and Cement Finishers union. Mr. D'Andrea told him that because he had lost his position as a result of a jurisdictional dispute he would be kept on the top of the hiring hall list.

42. Mr. Gagliardi, however, remained bitter about the failure to refer him to Alvaro Construction. He was referred again to the Tileman project between July 23 and August 28, 1981. When that job ended Mr. Gagliardi felt that he was owed a long term job and registered his displeasure with Mr. Iacobelli and Mr. D'Andrea. Apparently at one point he went to the hiring hall and, being unable to get a satisfactory explanation as to why he had not been referred in correct order to the Alvaro job, he threatened something drastic and, by his own account, feigned going to his car to get a gun. When he returned to the hiring hall he was physically restrained by Orfeo Iacobelli and fortunately nothing more serious occurred. Thereafter, however, Mr. Gagliardi was referred to a long term job with Collavino Construction on September 3, 1981. He took that job after refusing another short term job at Canadian Asbestos Covering Limited on August 31, 1981. No evidence was called by the respondent to explain why Mr. Gagliardi was initially referred substantially out of the hiring hall list order to Tileman on May 8, 1981 nor to account for how the assignment to Alvaro Construction was given to Mr. Gabrieli and not to him. Nor was there any explanation of the basis upon which Mr. Gagliardi was virtually kept in the position of being at the top of the hiring hall list until a long term job was found for him at Collavino Construction on September 3, 1981. The Gagliardi episode illustrates perhaps better than any other the power which Mr. D'Andrea and Mr. Iacobelli hold over the lives of members whose livelihood depends on the movement of the hiring hall list. It also reveals the passionate reactions which can well up when members have reason to believe they have been cheated.

43. Much of the concern underlying this complaint is the feeling of Mr. Portiss and others among the general membership that the families of those who hold union office are given preferential treatment in the administration of the hiring hall. The evidence establishes that the family ties of Mr. D'Andrea and Mr. Iacobelli extend throughout the union's administration and its general membership. The evidence concerning the treatment of Cecilio Iacobelli confirms Mr. Portiss' suspicions. Mr. Iacobelli is a student, although he has been a member of Local 1089 for some three years. According to his own testimony he has no skills in cement finishing, has never been referred out from the hiring

hall as a cement finisher, never registered as a cement finisher and has never done cement finishing work. Cecilio Iacobelli is related by marriage to Orfeo Iacobelli, the president of the local and its assistant business manager. It should also be noted that the hiring hall books are kept principally by Anna Iacobelli, the daughter of Orfeo Iacobelli who is employed as a secretary. When members register on the out of work list, all entries including special classifications, are made exclusively by the secretary.

44. The evidence establishes that on January 14, 1981 Cecilio Iacobelli registered in the out of work list as number 597. On April 3, 1981 he was referred to a job at Rankin Construction. He therefore passed in excess of 250 members on the out of work list who had registered before him, many of whom did not get job referrals until later in May or June of 1981. No explanation was forthcoming from the respondents to account for the preferential treatment of Cecilio Iacobelli nor to explain why the notation "cement finisher" appears next to his name in the out of work book when he has no such qualification. In the face of that evidence the Board concludes that he was referred out of turn without justification; we cannot resist the inference that his special treatment was based on his relationship to Orfeo Iacobelli, the president of Local 1089 and that the designation "cement finisher" was inserted deliberately to conceal the blatant favouritism shown to him. In the face of that evidence, we see no reason to strain to rely on any of the notations of classifications in the hiring hall books to explain other referrals out of turn.

45. A substantial number of other referrals which are out of keeping with the generally accepted hiring hall rules was established in evidence. They may be referred to briefly. On November 6, 1981 George Iacobelli registered on the out of work list as number 57. Four days later, on November 10, 1981 he was referred to Lummus Construction as a foreman. The referral of Mr. Iacobelli disregarded the precedent place on the out of work list of Mr. Portiss, who was then registered as a foreman out of work since October 26, 1981. Five other foremen in addition to Mr. Portiss were also passed over in favour of George Iacobelli. No explanation was given by the officers of Local 1089 for the preferential treatment of George Iacobelli.

46. Gino Iacobelli also found employment with Lummus Construction. The evidence establishes that he registered in the out of work list as number 345 on June 30, 1982. He was referred to Lummus Construction on September 10, 1982. Gino Iacobelli was also referred out of turn, passing members who stood as much as 320 positions ahead of him on the out of work list. No special classification was registered next to Gino Iacobelli's name nor was there any explanation given by the union for his preferential treatment. While there is evidence to suggest that Iacobelli did some foreman's work on the job at Lummus Construction, the evidence establishes that some 9 foremen, including Mr. Portiss, preceded Gino Iacobelli on the out of work list.

47. On September 10, 1982 Mario Savo was laid off from Rankin Construction. The same day, without registering in the out of work book, he was referred as a foreman to the Chemstand project at Imperial Oil. The referral of Mr. Savo passed over some 18 members, including Mr. Portiss, who were then registered in the out of work list as foremen. The preferential referral of Mr. Savo could not have been detected because he was not entered on the out of work list. His referral out of order only came to light through scrutiny of his individual work card. No evidence was called to explain why Mr.



Savo was assigned a foreman's job in preference to 18 others who would have stood ahead of him on the list, many of whom had to wait considerably longer for their work assignment.

48. One member particularly troubled by the referral of Savo was Donato Marinaro. Mr. Marinaro, who had unsuccessfully opposed Mr. D'Andrea in the election for business agent, had been on the out of work list since May 9, 1982 when he was referred to Chemstand also on September 10, 1982. He had registered as both a foreman and cement finisher. Mr. Marinaro's evidence establishes that he was terminated from a job on May 7, 1982 as a result of a jurisdictional dispute. He was not as fortunate, however, as Mr. Gagliardi. When he asked Mr. D'Andrea what would happen to him he was told that there was nothing that could be done and that he must go to the bottom of the list. Having waited on the list for several months, Mr. Marinaro was understandably upset that he was given a referral to Chemstand with Savo who had no waiting period whatever. Moreover, it was not clear to Marinaro why Savo was referred as a foreman while he was dispatched as a cement finisher at a lower wage rate. When Mr. Marinaro approached Orfeo Iacobelli at the time to ask why he did not get the same treatment as Savo, Iacobelli answered that he had not been aware that Marinaro could do the job and said, "maybe next time we will give you a chance". The Board cannot reconcile that cavalier answer with the union's own records, including the hiring hall list, which specifically records Mr. Marinaro as both a foreman and cement finisher.

49. The Board is satisfied on the evidence that complainant Joe Portiss, as well as Mr. Marinaro did not stand in good favour with the respondent Rocco D'Andrea nor with the President of Local 1089, Orfeo Iacobelli. Both had run for office, Marinaro directly against D'Andrea. Nor can we accept the submission of counsel for the respondents that there is no evidence of ill will towards Mr. Portiss. The evidence of Ms. Debbie Smith establishes that on one occasion, when she had been sitting at the same table as Mr. Portiss on a job site during the lunch break, Orfeo Iacobelli approached her after Portiss had left and told her that she should not sit at the same table as Portiss, "because he is trouble". There can be no doubt, on the evidence before the Board, that at all material times the respondent Rocco D'Andrea and officers of Local 1089 saw both Mr. Portiss, and Mr. Marinaro and members associated with them as political enemies.

50. There are a number of other instances where Mr. Portiss was passed over by members who were below him on the list, without any apparent reason or explanation. Camille DePaepe, who registered as a burner in the out of work book as number 411 on November 28, 1980 was referred to Greenspoon Construction on March 25, 1981 even though Mr. Portiss, who then stood as number 383 and was also registered as a burner, was available and stood ahead of him on the out of work list. Onorio Cicchini was dispatched as a foreman to Rankin Construction on February 9, 1981 although he was below Mr. Portiss on the out of work list. While Mr. Portiss was not then registered as a foreman the evidence establishes that the union's executive knew, or should have known, that he was so qualified, as they eventually recognized by his referral as a foreman on July 2, 1981. Salvatore Gagliardi, also registered as a burner as number 446, was referred to Diamond Construction on January 19, 1981, substantially ahead of Mr. Portiss who preceded him by a wide margin on the out of work list.

51. The testimony of Mr. Salvatore Gagliardi raises still more questions about the classification system employed by Local 1089. It is his own evidence that he has no skills



in cement finishing but that he was once referred as a cement finisher, being dispatched to Collavino Construction on July 15, 1981. His cement finishing consisted of intermittent work as a vibrator man. It appears that a number of employees were being tried for that position and another was finally recruited to do it permanently. Mr. Gagliardi was, nevertheless, dispatched to do that work and was paid the extra 50¢ per hour as a vibrator man for the entire five months of his employment on that job.

52. The evidence establishes that when Mr. Portiss registered on the out of work list on November 24, 1980 he ultimately was referred to employment on April 28, 1981. His referral, however, only occurred after a number of other members who were lower on the hiring hall list than himself were given referrals, some as early as January and February of 1981. On that occasion about 20 members were referred ahead of Mr. Portiss. A number, but not all, of them have the designation of cement finisher in the out of work book. Since one of those is Cecilio Iacobelli, whose classification in that regard was plainly fraudulent, the Board cannot, absent any evidence beyond the bare documents, accept the union's records as proof that any of the referrals made in advance of Mr. Portiss were justified on the basis of specialized requests.

53. The same was true when Mr. Portiss again registered on the out of work list on July 13, 1981. Before he was referred out for work on August 19, 1981 at least six employees below him on the list were sent out ahead of him between July 17, 1981 and August 19, 1981. Only one of those bore the designation "cement finisher" on the out of work list and, for the reasons canvassed, the Board can place no weight on that notation.

54. The complainant also placed his name on the out of work list on October 26, 1981 and was referred for employment on November 20, 1981. The evidence establishes that in the interim at least two employees with inferior positions on the out of work list were referred for work ahead of him.

55. The evidence also discloses substantial inconsistency in the administration of the rule stipulating that members who refuse a job must wait seven days and return to the bottom of the work list. On June 4, 1982 Mr. Portiss registered on the out of work list after having been on workmen's compensation. He advised the hiring hall staff that he was still partially disabled and receiving compensation benefits, a condition which continued down to the hearing. On that basis he requested referrals to work as either a foreman or a tool crib tender as he could not perform heavy labour work. On September 30, 1982 Mr. Portiss indicated on the telephone, through his wife, that he was not available for a referral for any job other than foreman or tool crib tender. The union then treated him as having refused a referral and moved him from the top to the bottom of the hiring hall list seven days later on October 7, 1982.

56. The work card of Kenneth Wedemire indicates that on September 9, 1981 he refused a referral. It is plain from the hiring hall records that the list was not then current. Mr. Wedemire was nevertheless returned to the list on the same day, September 9, 1981. Subsequently on December 8, 1981 a refusal is again noted on his work card. On that occasion he was apparently held off the list for seven days and reinstated on December 15, 1981. The same occurred again on June 17, 1982 when his refusal apparently caused his suspension for seven days until June 24, 1982. The work record of Salvatore Palelli indicates that he refused a job on September 22, 1980 but was returned to the list on the same day. The out of work book also indicates that the hiring hall list

was not current on June 15, 1981. The records indicate, however, that on that date union member Jake Feenstra refused a job referral and was reinstated to the list on the same day. On June 16th it would appear from the records that the same was done for union member Jose Bastos. Neither Feenstra nor Bastos have any special classification next to their names in the out of work book for the period in question. Absent any explanation from the union's officers the Board is without any basis to understand what criteria, if any, were then used or are used generally in the administration of the hiring hall rule in relation to the refusal of job referrals. We are, more particularly, unable to see how Mr. Portiss merited removal to the bottom of the list, a sanction which was bound to cause him many weeks of unemployment at a time when the list was moving slowly, when in similar circumstances other members apparently did not receive the same treatment. While the Board is prepared to accept that some latitude may be necessary in the administration of a hiring hall's rules, just as discretion is necessary to some extent in the administration of any trade union, we are compelled to draw adverse inferences when the documentary evidence filed shows a plainly inconsistent pattern and no explanation is forthcoming. The effect of the strict adherence to the rule in the case of Mr. Portiss on September 30, 1982 meant that he was deprived of a further referral at least until January of 1983. The list was then extremely long and his co-members at the top of the list obtained job referrals generally in September and October of 1982. The effect for the complainant was at least four months more of unemployment.

57. The Board also has concern with the evidence as it relates to other disabled members. There appears to be no allowance in the union's hiring hall rules for members who are partially disabled or, due to age, are unable to perform all tasks for which they might be referred. The example of Mr. Portiss, confirmed in the further evidence of Mr. Lou D'Allessandro, establishes that the administration of the hiring hall makes no rational distinctions for injured workers. In effect it imposes on them referral rules which arbitrarily force them to either accept a referral for a job which they cannot perform or to surrender their position at the top of the list and line up again at the bottom for what may be an extended period of unemployment. There appears to have been no attempt in Local 1089 to establish a *bona fide* list of partially disabled employees nor to channel referrals for lighter jobs such as flagman or tool crib tender to those whose physical disabilities would disqualify them from other work. We see no basis to sustain a hiring hall practice which is *prima facie* arbitrary, no thought being given to the merits of an injured worker's case, and which amounts to *de facto* discrimination against disabled workers. That is particularly so when, as in this case, it has not been established that the rule on refusals is uniformly enforced. We must therefore conclude that Mr. Portiss was wrongfully deprived of the opportunity of job referrals in the period following September 30, 1982.

58. Some evidence was adduced and much argument directed to allegations by Mr. Portiss and his counsel that during the course of the hearing the union's hiring hall list and work referral book were tampered with. The evidence of Mr. Iler and Mr. Portiss is to the effect that they saw changes in these union records between November 16, 1982 when they were first shown the documents at the initial Board hearing, and subsequent hearings of the Board in January of 1983. As a result of these allegations the actual books, rather than mere photocopies, were taken in evidence by the Board on February 2, 1983. If it were necessary to comment on this part of the case we would. Given the overwhelming nature of the evidence brought in support of Mr. Portiss' claim, however,

we do not feel that it is appropriate to do so. On the whole, the evidence in support of those allegations is not of the rigorous quality that should be required to substantiate such serious charges. While he might have done so, Mr. Portiss adduced no forensic evidence to establish that these records were altered or falsified. Rather, he relied on his own recollection and that of Mr. Iler, together with such notes as they had, from their review of the hiring hall books, some three months before the allegations were made. On this aspect of the case we therefore do not deem it appropriate to make any finding. We have an ample basis on which to make a determination on the merits of the section 69 complaint. In this case whether there has been deliberate forgery or a conspiracy to defraud is a serious issue best proved before a criminal tribunal applying criminal standards of proof based on expert testimony.

59. The Board is satisfied that on the merits of the section 69 complaint Mr. Portiss must succeed. A number of aspects of this case cause the Board serious concern. On the whole the evidence establishes that the hiring hall of Local 1089 is administered in the absolute discretion of the respondent Rocco D'Andrea. The hiring hall of Local 1089 was administered in a way that made abuses of the rights of its members under section 69 of the Act virtually inevitable. No clear list of hiring hall rules was circulated, posted or otherwise made known to the members. Such rules as there were existed only by undefined tradition. The Board is not satisfied on the evidence that any set of written rules was ever adopted by the executive committee of the union or approved by the general membership. The weight of the evidence is to the contrary.

60. Members were reportedly denied access to the out of work list and work referral book. These documents were kept behind a caged window in the hiring hall and could be scrutinized only with the permission of Mr. D'Andrea. That permission appears seldom, if ever, to have been given.

61. The hiring hall itself is plainly tainted by nepotism. The members of the families of Mr. D'Andrea and Mr. Iacobelli appear and re-appear in all facets of the affairs of Local 1089 from positions of executive authority to union steward to hiring hall secretary, and extending to the rank and file membership. The evidence concerning the discriminatory referral practices exercised in favour of Mr. Cecilio Iacobelli is but the most obvious example of the abuse of power for the benefit of their families exercised by the officers of Local 1089. A union and its hiring hall are not a private business. They exist pursuant to statutory rights of exclusive bargaining agency established under the *Labour Relations Act*. The exercise of those rights is a trust to be administered fairly and objectively for the benefit of all members. Favouritism shown to members of the families of union officers at the expense of other members is the plainest form of arbitrary and discriminatory treatment contrary to section 69 of the Act.

62. If the members of the local had unequal access to jobs, they had equal inaccess to the laws of their union. We find it impossible to believe that the constitution and by-laws of a union can be so unavailable to its members as was the case in Local 1089. The existence of a constitution and by-laws are a precondition to union status under the *Labour Relations Act*. A union which, by indifference or design, keeps its members from access to its internal laws risks raising fundamental questions about its continuing status as a union. A constitution and by-laws are obviously of little value if they cannot be used. While the Board does not necessarily accept the suggestion of some witnesses that each



member of a trade union should be given a copy of its constitution and by-laws when he joins, we do not feel it would be unreasonable to expect any union to keep a sufficient number of copies of its constitution and by laws for distribution, at no cost, to that predictably limited number of members who might be sufficiently interested to have a copy. The suggestion advanced by counsel for the respondents, and apparently made on a number of occasions by Mr. D'Andrea, that those who wanted to read the constitution could obtain the loan of a copy from the hiring hall, is not acceptable. In the highly politicized environment of the union many members might understandably decline that invitation out of a concern, be it justified or not, that if they ask to borrow or see a copy of the constitution they will be perceived as questioning, if not undermining, the authority of Mr. D'Andrea. In this case the failure or refusal of Local 1089 to provide its members copies of its constitution and by-laws clearly frustrated the ability of a concerned minority of members to seek redress inside the International Union for perceived injustices in the hiring hall's practices. That deficiency is therefore intrinsically related to the section 69 complaint. It also explains why Portiss did not pursue avenues of redress internally, a point not strenuously argued by the respondents.

63. Counsel for the respondents moved for a non-suit on the basis that the evidence establishes no *prima facie* under section 69 of the Act. We cannot agree. The evidence overwhelmingly supports the inference that the job referrals out of order to the prejudice of Mr. Portiss were arbitrary and discriminatory. No evidence was adduced to explain any of them. While much argument was addressed to the need for referrals by job classification, the Board can place no reliance on the submission of counsel for the respondents that we should view the referrals out of order as justifiable on that basis. The fraudulent referral of Cecilio Iacobelli as a cement finisher months ahead of other unemployed members removes all credibility from that submission. On the whole of the evidence the Board is forced to conclude that the classification scheme has been left deliberately vague by Mr. D'Andrea and the union executive to facilitate the practice of favouritism and discriminatory job referrals. The evidence confirms that the hiring hall has been used by the officers of Local 1089, and especially Mr. D'Andrea, as an instrument of patronage. Nepotism and patronage have no place in the hiring hall contemplated under the *Labour Relations Act*.

64. The motion for a non-suit respecting charges of intimidation and coercion must, on the other hand, be sustained. The Board cannot find, on the evidence before it, any violation of section 70 of the Act. While there is ample evidence to establish arbitrary and discriminatory job referrals there is nothing to establish that the respondent Rocco D'Andrea or Local 1089 have attempted to intimidate or coerce any member in the exercise of their rights under the Act. The only direct evidence of concern in this regard is a threatening telephone call received at night by Mrs. Portiss when her husband was at work. There is nothing before us to establish that that call was made by the respondents or that it was made with their knowledge or approval. We therefore make no finding against either Mr. D'Andrea or Local 1089 in respect of the allegation that they engaged in intimidation or coercion.

65. The finding of a violation of section 69 is made against Local 1089, as it is the duty of the union under that section to refer and designate members to jobs in a manner that is not arbitrary, discriminatory or in bad faith. A trade union, however, can only act through its officers. We have no hesitation concluding that these violations of the Act



found against Local 1089 are ultimately the responsibility of its business agent, the respondent Rocco D'Andrea. Mr. D'Andrea is shown by the evidence to be a strong and skillful business manager. As a representative of the least skilled of trades in a sector of the economy not noted for gentle manners, he has obviously done much to consolidate the position of his local and advance its members' interests. The Board is under no illusion that the rough and tumble of labour relations in the construction industry requires tough and decisive leadership. A business agent needs latitude for discretion in day-to-day decisions. That is especially true for the administration of a fractious body of members in a hiring hall, particularly in times of high unemployment. A firm hand and day-to-day discretion cannot, however, justify the abuse of the important trust that vests in the administrators of a hiring hall. It cannot, in light of the dictates of fairness in section 69 of the *Labour Relations Act*, extend to the distribution of benefits to family and friends or to the suppression of those who have fallen from favour with the union executive.

66. We turn to consider the remedy appropriate in this case. We should emphasize that in doing so we view the record as establishing a widespread disregard of the most fundamental rights of the members of Local 1089 in the administration of its hiring hall. Given the extent of the abuse disclosed, with particular regard to the suppression of the union's constitution, the Board has had cause to reflect on whether the status of Local 1089 as a union should be re-examined. Given the central role of Mr. D'Andrea, we have also considered whether our jurisdiction under section 89 of the Act would extend to the possibility of his suspension or removal from office. Those remedies were not, however, argued before us and we are satisfied that a strong remedial order implemented in good faith will make such extreme measures unnecessary. The Board will in any event remain seized of this matter in the event that the remedies which we now order should prove inadequate. We have every confidence, however, that the far-reaching remedies which we are ordering will redress the arbitrary and discriminatory practices which have in the past tainted the administration of the union's hiring hall. We have every reason to expect that the officers of Local 1089 and Mr. D'Andrea will co-operate in the implementation of the Board's orders to establish and maintain an open and rational hiring hall system with full accountability to the general membership.

67. The Board's remedy begins with the premise that a union is its members. It is the general membership, and not the elected or appointed officers of a union, which give it life and purpose. It is the intent of the constitutions of unions generally that responsibility and accountability for administrative acts ultimately rest with the general membership. Accountability is meaningful, however, only to the extent that union members can be aware of the actions of their officers and can weigh those actions against the mandates of the union's constitution, by-laws and, in this case, its hiring hall rules. In the construction trades hiring hall rules are the instrument by which fairness and objectivity can be maintained in job referrals, one of the most critical functions of a union in the construction industry. The constitution and by-laws are the framework through which the general membership can adopt and, from time to time, amend the hiring hall rules to better serve their legitimate needs.

68. The facts in this case disclose that a screen has been raised between the general membership of Local 1089 and the day-to-day actions of its officers. Mr. D'Andrea and Mr. Iacobelli have wielded authority and discretion apparently without guidelines. They

have, without any felt obligation to account to the membership made decisions in obvious disregard of the hiring hall rules as they are generally understood. In understanding those rules and the rules in relation to specialized classifications the members of Local 1089 have been left with no clear direction or map. When hiring hall rules are not clearly known and are administered from day-to-day without regard to consistency or any guiding principle, arbitrary and discriminatory treatment of the general membership is inevitable. The Board's remedy, therefore, is fashioned to remove the barrier between the union's officers and its general membership and to ensure, insofar as possible, that accountability is restored.

69. That can only be accomplished by opening decisions in relation to the administration of the hiring hall to regular scrutiny by the membership. This can in large measure be achieved by an order requiring the immediate discussion and adoption of hiring hall rules by the general membership and the permanent posting of those rules in the hiring hall, with copies to be provided to each member. Because the evidence establishes that the vagueness of the existing classification system has been the cause of much arbitrariness, the Board is satisfied that any remedial order must also address the establishment of a permanent system for the designation of classifications and standards governing the experience or ability of individuals to qualify within them. Provision should also be made for the fair treatment of members who, because of age or disability, are limited in the work they can perform. We are not impressed with suggestions that such refinements would be unduly onerous in the administration of the hiring hall. The existing registry system in the hiring hall is plainly inadequate for the proper classification and referral of the hundreds labourers within Local 1089. Given the thousands of referrals, many of them with specialized qualifications, which the hiring hall is required to make, it may be that a computerized recording and recall system for the out of work list will be the most viable alternative to ensure a fair administration of job referrals. While we do not see that as something which the Board should order, we feel it is a measure which the officers of Local 1089 should consider.

70. The evidence discloses a climate of fear among the general membership of Local 1089. Without commenting on whether that fear is justified, we are satisfied that the Board's remedial order should include some provision to allow the members of Local 1089 to obtain information on the day-to-day administration of the hiring hall without the necessity of a confrontation with Mr. D'Andrea. A transcript of the proceedings of a general membership meeting was adduced in evidence, having been covertly recorded by Mr. Portiss under the direction of the Ontario Provincial Police. It reveals, to say the least, a unique way of conducting a meeting. We are prepared to give considerable allowance for the less than parliamentary style to be expected in any meeting of rank and file labourers. Having said that, however, the Board must agree with the testimony of a number of witnesses that Mr. D'Andrea's method of conducting a meeting does not lend itself to a free flow of questions, much less to objections, from individual members. We are therefore satisfied that for a period of time the general membership should have the benefit of a third party retained to audit periodically the day-to-day administration of the hiring hall's records and procedures, and to report at regular monthly meetings to the general membership. The out of work list, including notations of all job referrals, as well as a parallel list of employers' requests for labourers should also be permanently posted and kept current in the hiring hall. If the hiring hall list is to be administered in good faith the referral out of order of employees should be readily identifiable by the general

membership and members should be entitled to an explanation for such referrals. The permanent posting of the list and the appointment for two years of an auditor to scrutinize its administration, with regular reports to the membership, should begin the process of fuller information to members and alleviate their reticence to make inquiries.

71. We are also satisfied that Mr. Portiss should be compensated for any income which he lost as a result of the violations of section 69 of the Act established above. The determination of precise figures may require an element of speculation, since it cannot be precisely determined in all cases which job referrals he would have obtained if the out of work list had not been administered in an arbitrary fashion. It will nevertheless be possible to arrive at a justifiable figure which will reasonably redress the wrong done to him. It may also be that in some cases, as apparently occurred in the referral of Ms. Debbie Smith to Bravo Construction, that the job assignment out of turn had no economic impact on Mr. Portiss because he was then at work. We are confident that the parties will be able to make a reasonable determination of the appropriate amount of compensation on the basis of the Board's findings. We shall remain seized of this further aspect of the matter in the event that they are unable to do so.

72. Lastly, given the broad nature of the relief ordered and the obvious interest of all members of Local 1089 in the Board's determination of the violations of section 69 of the Act, we deem this an appropriate case for a posting order. A notice summarizing the Board's findings and the remedies ordered should therefore be posted in the hiring hall of the respondent Local 1089, in both English and Italian for a period of not less than 90 days.

73. For all of the foregoing reasons the Board finds and orders as follows:

(1) There has been no violation of section 70 of the Act established against either the respondent Rocco D'Andrea or Local 1089 of the Labourers' International Union of North America.

(2) Local 1089 of the Labourers' International Union of North America has engaged in arbitrary and discriminatory referrals to employment and designations to employment in the administration of its hiring hall contrary to section 69 of the *Labour Relations Act*.

(3) Local 1089 and its officers shall cease forthwith from the administration of the hiring hall's out of work list in any way that is arbitrary, discriminatory or in bad faith.

(4) The executive committee of Local 1089 shall forthwith prepare a written list of hiring hall rules. Such list of rules shall be presented for explanation, discussion and adoption, with or without amendment, by the general membership of Local 1089 within 90 days of the date of this order.

(5) A copy of the hiring hall rules so adopted, as amended from time to time, shall be permanently posted in the hiring hall and a copy of the rules, as amended from time to time, shall be provided to each member within 10 days of their approval by the general membership.



(6) At the next general meeting of the Local a committee on classifications, comprising no less than five members elected from the general membership, shall be established. It shall, within ninety days thereafter, recommend to the general membership a list of specialized job classifications as well as rules governing the determination of qualifications for registration on the out of work list under such classifications. It shall also recommend procedures for applications by members for admission to the classifications established. The classifications, standards and procedures so recommended shall be adopted, with or without amendment, by the general membership. The classifications, standards and procedures so approved shall be permanently posted in the hiring hall and copies, as amended from time to time, shall be provided to each member of Local 1089.

(7) The respondent Local 1089 and the complainant shall, within 30 days of this order, meet and agree upon the selection of a person or firm licensed under the *Public Accountancy Act* or a firm whose partners are licensed under the Act. The person or firm agreed upon shall not be from Sarnia and shall not have any other contractual relation with Local 1089 or any other local of the Labourers International Union of North America. The auditor so selected shall, at the expense of Local 1089, be retained for a period of two years to audit, on a periodic basis, the administration of the hiring hall rules and procedures, including job referrals. The auditor shall be given full access to all hiring hall documents maintained by Local 1089, as well as to such other sources of information as may be necessary for the purposes of the audit. The auditor shall report to each regularly scheduled meeting of the general membership, and be available to answer the questions of members respecting any matter relating to the administration of the hiring hall list and job referrals. In the event that the parties are unable to agree on the selection of an auditor they shall, within 45 days of the date of this order, each submit three names proposed by them to this Board and the Board shall then select an auditor from among the names submitted.

(8) Copies of the out of work list, with entries of all referrals, shall be posted in the hiring hall in a clear and legible manner. A companion list of employer requests for referrals shall also be posted, including entries of members who are referred under each request. The two lists shall be so maintained and revised from time to time as to allow all members to know their place and the place of others in the order of the list and to be aware of all referrals, including the dates of referrals, the employer to whom a member is referred and, where applicable, any special classification of employee requested or dispatched.

(9) Within 90 days of the date of this order, the executive committee of Local 1089 shall make recommendations to the general membership for the establishment of a list of injured or partially disabled



members with a view to devising a system for the referral of such members, without penalty or discrimination, to jobs which they are reasonably able to perform. Any rules adopted in relation to those recommendations shall be posted in the hiring hall and copies of the rules, as amended from time to time, shall be provided to each member of Local 1089.

(10) The respondent Local 1089 of the Labourers' International Union of North America shall post forthwith copies, in English and Italian, of the attached notice marked "Appendix", duly signed by its business agent, in conspicuous places at its hiring hall in Sarnia, including all places where notices to members are customarily posted, and shall keep these notices posted for 90 consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material.

(11) Copies of the Constitution and By-Laws of Local 1089 and of the Labourers' International Union of North America shall be made available, at no cost, to all members requesting copies of same at the union's hiring hall. Copies of the Constitution and By-Laws shall be kept at the hiring hall in sufficient numbers to satisfy such reasonable requests for copies as are made by members from time to time.

(12) The respondent shall forthwith compensate the complainant, Joe Portiss, for all wages and benefits lost as a result of its violation of section 69 of the *Labour Relations Act*.

74. The Board remains seized of this matter in the event of any dispute between the parties respecting the application or interpretation of its decision.

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**1675-82-R** London & District Service Workers' Union, Local 220, AFL, CIO, CLC, Applicant, v. **Price Waterhouse Limited** and The Maritime Life Assurance Company, Respondents

Sale of a Business - Respondents appointed receiver and manager by private instrument - Subsequently appointed as receiver and manager by Court order - No distinction for labour relations consequences between privately and Court appointed receivers - Respondents not successor employers - Respondents not responsible for outstanding wages owed by insolvent employer

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members B. L. Armstrong and E. J. Brady.

***APPEARANCES:** David Starkman, Paul Middleton and Bernie Hanson for the applicant; R. Budd and B. Grossman for Price Waterhouse Limited; Philip Spencer, Q.C. for The Maritime Life Assurance Company.*

#### **DECISION OF THE BOARD;** July 11, 1983

1. The applicant has applied to the Board under section 63 of the *Labour Relations Act* with respect to its bargaining rights. The applicant has alleged that on or about February 16, 1982, there was a sale of a business by Chateau Gardens (Hanover) Inc. ("Chateau") to Price Waterhouse Limited ("Price") and The Maritime Life Assurance Company ("Maritime"). It was the position of the applicant that as a result of this alleged sale the respondents are bound by a collective agreement entered into by the applicant and Chateau.

2. In a letter dated December 23, 1982, the applicant informed the Board that it wished to make representations as to the application of section 1(4) of the Act.

3. Initially, Price adopted the position that the applicant is not entitled to bring this application before the Board because it did not obtain leave of the Supreme Court of Ontario upon notice to Price of its intention to make this application and had not applied to the Court pursuant to paragraph six of the order of The Honourable Mr. Justice Anderson made on February 16, 1982, wherein Price was appointed the receiver and manager of Chateau. In a decision dated March 4, 1983, (now reported at [1983] OLRB Rep. Mar 441) the Board held that the leave of the Court was not required before the applicant may file this application.

4. During the earlier hearings of this application, Price informed the Board that attempts were being made to sell Chateau on January 17, 1983, subject to the consent of the Court. During the course of the hearings, on April 27, 1983, the following minutes of settlement were entered into and filed with the Board.

Board File No. 1926-82-R

Minutes of Settlement

London & District Service Workers'  
Union Local 220, AFL, CIO, CLC

(Local 220)

- and -

Versa Care Ltd.  
517800 Ontario Ltd.

(Versa-Care)

The parties agree to the following disposition:

1. Versa-Care Ltd. agrees that as of January 17, 1983 it became a successor employer and is bound by the collective agreement between Chateau Gardens (Hanover) Inc. and London and District Service Workers' Union, Local 220, which agreement is dated September 2, 1982.

2. Versa-Care Ltd. will assume its obligations under the collective agreement as of January 17, 1983. Local 220 will not attempt to enforce any alleged claims under the collective agreement which claims arose prior to January 17, 1983 until the Ontario Labour Relations Board has rendered a decision in Board File Number 1675-82-R.

3. Local 220 hereby withdraws Board File Number 1926-82-R.

Dated at Toronto this 27th day of April, 1983.

"M. Gordon Spear"

"Lynn Malone"

"Marian Inthof"

"Joan Weigel"

"Marie Zittler"

"Mary Ann Kivetsch"

"Paul D. Middleton"

For the Company

For the Union

5. At this point Price moved for a dismissal of this application because it alleged there was no policy basis for continuing when the applicant had agreed that Versa-Care Ltd. became the successor employer on January 17, 1983, and bound by the applicant's collective agreement dated September 2, 1982. The applicant opposed Price's motion and adopted the position that it was concerned with bargaining rights and outstanding

grievances, and, that while the issue of bargaining rights had been ultimately resolved, the outstanding grievances required an answer to the question of whether Price and/or Maritime was/were successor employer(s) under section 63 between February 12, 1982, and January 17, 1983. The Board dismissed the motion of Price and ruled that the applicant was entitled to have a determination under section 63 with respect to whether Price and Maritime was/were successor employer(s) between February 12, 1982, and January 17, 1983.

6. The facts involved in this application are not in dispute. On May 24, 1979, Chateau was operating a nursing home in Hanover, and on that date it executed a debenture in favour of Maritime in the amount of almost four million dollars. On December 1, 1980, the applicant was certified by the Board to represent full-time employees of Chateau at Hanover. On December 8, 1980, the applicant gave notice to bargain to Chateau and bargaining between the applicant and Chateau continued during 1981. In August of 1981, the matter of a collective agreement was referred to arbitration under the *Hospital Labour Disputes Arbitration Act*. The Board established under that Act rendered its decision on July 19, 1982. On October 8, 1982, the applicant was certified by the Board for part-time employees of Chateau. The collective agreement which was settled by arbitration expired on December 1, 1982, and the applicant gave notice to bargain on November 18, 1982, with respect to the full-time employees for a new collective agreement. On October 12, 1982, the applicant gave notice to bargain with respect to the part-time employees.

7. Chateau went into default under its debenture to Maritime and on February 12, 1982, Price was appointed receiver and manager of Chateau by Maritime pursuant to the debenture. On February 16, 1982, pursuant to an application by Maritime, the Supreme Court of Ontario, by the order of Anderson, J., appointed Price the receiver and manager of Chateau. The reason for the change in Price from a privately-appointed receiver and manager under the debenture to a court-appointed receiver and manager resulted from a concern and a consensus with respect to the interests of other creditors of Chateau. Well over one hundred investors loaned more than one million dollars to Chateau on unsecured notes. Chateau owed one hundred and fifty thousand dollars in property taxes. There was also a second mortgagee who was owed money. In addition, more than three hundred thousand dollars were owed to the Royal Bank of Canada.

8. Prior to February of 1982, the Minister of Health became concerned with deficiencies in the operation of the nursing home. To this end, the Ministry of Health had discussions with Diversacare (an organization experienced in owning and operating nursing homes). Diversacare put forward the name of Price. Diversacare and Price worked together to deal with the nursing care and financial problems of Chateau. Initially, two persons from Price and three persons from Diversacare entered the nursing home and Price commenced its stewardship as a receiver and manager. One of the greatest concerns initially was that the licence to operate a nursing home was in jeopardy.

9. Upon the arrival of Price as receiver and manager the management of Chateau was replaced. However, Chateau's board of directors continued to exist. Price held a meeting of the employees of Chateau on or about February 12, 1982. The employees



were informed that it was Price's intention as receiver and manager to continue to operate. The employees were informed that they would be paid. However, this was not a personal undertaking by Price. Price attended on the local bank and Diversacare met with the director of care to dispel any alarm over the operations. The administrator of the nursing home was immediately replaced and, on the appointment of Harold Lebold to that position, Diversacare was satisfied that it need not become deeply involved in the operations of Chateau. Once sufficient controls were in place, Price felt that Chateau did not require the full-time presence of anyone from its firm. After the award of the board of arbitration was released in July of 1982, there was concern by the full-time staff over back pay and Mr. Lebold notified Price of this concern. Price responded by dictating a communique to Mr. Lebold over the telephone. The communique was typed on the stationery of Chateau and posted in the nursing home on September 3, 1982, and reads as follows:

September 3, 1982

TO THE EMPLOYEES OF SAUGEEN VILLA AND  
CHATEAU GARDENS

As you are aware, the full-time union employees of Saugeen Villa and Chateau Gardens have recently been awarded an hourly wage increase following from an arbitrator's decision. Two issues have arisen from this:

1. substantial differences in wage rates that now exist between full-time union and other employees.
2. the retroactive wage award given to the full-time employees.

As Court-appointed Receiver and Manager, Price Waterhouse Ltd. is concerned about these issues and their effect on staff morale.

As you know we have been attempting to find a new owner for the complex and have advertised the complex for sale. On September 9 we will be opening any tenders received and hopefully selecting a new owner. Once this has been completed and a new owner found, or it has been determined that no suitable purchaser exists at this time, we will be proceeding without further delay with the issues of retroactive payments for the union employees and wage increases for the other employees. As part of the process in resolving these matters, we shall be seeking the advice and direction of the Court in order to determine how we should fairly proceed.

We thank you for your patience in these matters and for the continued dedication to quality health care that we have seen demonstrated through the course of our administration.

Should you have any questions, please feel free to discuss them with Mr. Harold Lebold, our Acting Administrator.

Price Waterhouse Ltd.  
Court-appointed Receiver  
and Manager of

Chateau Gardens (Hanover) Inc. and  
Chateau Gardens (Hanover II) Inc.

10. The licence to operate the nursing home expired on March 31, 1982, and on that date a new licence was issued. The licence was in the name of Saugeen Villa Nursing Home ("Saugeen") at all material times and remained in the name of Saugeen until the consummation of the court-approved sale to Versa-Care Ltd. on January 17, 1983. At no time did any title pass from Chateau to Price. Title in the assets of Chateau passed from Chateau to Versa-Care Ltd. by means of a vesting order of the Supreme Court of Ontario. However, as may be expected, Price changed the names of the signing officers on Chateau's bank accounts in Hanover. The employees at the nursing home were paid on Chateau's cheques. Price's authority to act at Chateau originated in the court order wherein it was appointed receiver and manager. The powers set out in the order are in the usual standard form and permit Price to proceed in its stewardship. However, Price may seek directions from the court with respect to out of the ordinary matters.

11. At no time was title to any of Chateau's property vested in Maritime. None of Maritime's employees were present on the premises of Chateau during the period of Price's acting as receiver and manager. The debenture contains the usual provisions that in exercising any powers the receiver shall act as the agent for Chateau, no doubt because of the common law concept of a mortgagee in possession. The debenture also states that Maritime shall not be responsible for the receiver's actions.

12. During the period of the private appointment of Price between February 12 and 16, 1982, Price drew its powers from the terms of the debenture. Price received an indemnification from Maritime during this period covering monies expended but excluding acts of negligence. Price had the power to continue or discontinue to operate the business of Chateau, to hire personnel in order to operate the business, to schedule hours of work and vacations and to create new job classifications. However, this last power was not exercised. In its role as manager, Price informed local suppliers that they would be paid for new supplies and Diversicare's services were paid for on Chateau's cheques. At the time Price became receiver and manager, Chateau was engaged in negotiations with the applicant, and Mr. Lebold was instructed to attend the negotiations. The solicitors who had previously represented Chateau in these negotiations were also instructed to continue in that capacity. When the award of the board of arbitration was communicated to Chateau, Price instructed Lebold to sign the collective agreement on behalf of Chateau. On January 17, 1983, Price terminated the employment of the employees of Chateau and posted the following notice (on the stationery of Price) on a bulletin board:

January 17, 1983

Management and Employees of

Chateau Gardens (Hanover) Inc. and  
Chateau Gardens (Hanover II) Inc.

On Monday, January 17, 1983, a disposition of the assets of Chateau Gardens (Hanover) Inc. and Chateau Gardens (Hanover II) Inc. was completed. The assets were sold to Versa-Care Limited and 517800 Ontario Limited. The purchasers intend to operate the facilities known formerly as Chateau Gardens Retirement Community and Saugeen Villa Nursing Home. We would like to take this opportunity to thank the management and staff of Chateau Gardens (Hanover) Inc. for the assistance and co-operation demonstrated by them during the course of the receivership.

During the course of the next few days, the following will be issued to you:

- 1) Separation certificates pursuant to the Unemployment Insurance Act.
- 2) Vacation pay accrued and not paid out to you.
- 3) T4's setting out your earnings for both the 1982 and 1983 year to date periods.
- 4) Ontario Hospital Insurance Plan Form #104.

Yours truly,

"Price Waterhouse Limited"

Court appointed  
Receiver and Manager of  
Chateau Gardens (Hanover) Inc. and  
Chateau Gardens (Hanover II) Inc.  
J. S. Wilson, Vice President

It was the position of Price that the terminations were necessary because, upon the completion of the sale to Versa-Care Ltd., it was no longer the receiver and manager and the employees were no longer employees of Chateau. Price viewed the documentation referred to in the notice as a necessary administrative act on its behalf.

13. The applicant argued that the respondents had carried on the same business as Chateau and that this business had been sold, transferred or otherwise disposed of by Chateau to the respondents. The applicant posed the question of whether the appointment of Price by the court on February 16, 1982, amounted to a sale of a business to the respondents within the meaning of section 63 of the Act. The applicant referred to earlier decisions of the Board where the Board had been prepared to regard receivers and managers as employers in applications for certification. A review of these cases, however, contains no extensive analysis of the actual facts in these cases and it would not appear that the Board had the benefit of full argument. See, for example, *Guaranty Trust Co. of*

Canada 47 CLLC ¶16,500. In *Mount Citadel Limited*, [1976] OLRB Rep. July 367, the Board inclined to the view that a receiver-manager appointed by the court might be an employer.

13. The applicant queried who was the employer during the period from February 12, 1982, to January 17, 1983, if Price and/or Maritime was/were not the employer(s). In our opinion, the answer to this query is that Chateau remained the employer until the vesting order of the court and the approval of the sale by the court on January 17, 1983. At common law the appointment of a receiver and manager does not result in the dissolution of a company. See *Davey v. Gibson* 64 O.L.R. 627. A receiver and manager derives no title or estate from the court order which appointed him. He is merely an officer of the court responsible for collecting and dealing with the business or property covered by the terms of his appointment on behalf of the creditors. See *Vine v. Raleigh* (1883) 24 Ch. D. 238, 243; *Re Beaumont* (1910) 79 L.J. Ch. 744; *Justice v. James* (1898) 15 T.L.R. 181,182; *Company Receivers and Managers* (O'Donovan-1981) 294-297; and *Kerr on Receivers*, 14th Ed. (1972) 135-136. Chateau continued to exist but its ability to conduct its business had been drastically curtailed by its contractual obligation with Maritime in the form of a debenture. Once Chateau had defaulted under the terms of the debenture, Maritime was entitled to invoke the safeguards provided for in the debenture in order to protect its financial interests.

14. The functions of Price was to receive and disburse monies in managing the business of Chateau. As was stated earlier, no change in ownership occurred during the period of Price's acting as receiver and manager. Chateau continued to exist with a board of directors but with the full powers of Chateau to conduct its own business drastically curtailed. Price honoured the collective agreement during the period it was a receiver and manager. The purpose of section 63 is to preserve bargaining rights of a trade union and to maintain the *status quo* in collective bargaining. In order for a sale of a business to occur within the meaning of section 63, it is necessary that there be a disposition from Chateau which is a party to a collective agreement to another person. This did not happen until January 17, 1983. During the period between February 12, 1982, and January 17, 1983, Price acted as a receiver and manager privately and on the appointment of the court and it did no more and no less. During this same period, Maritime was merely seeking to protect its financial interests under the debenture. None of Chateau's assets or business was transferred to Maritime until after the sale of Chateau's business to Versa-Care Ltd. on January 17, 1983, when presumably Maritime's security was satisfied to the extent of the funds available from the sale. During the time Maritime was pursuing its financial interest, Chateau continued to exist with its control over the indispensable licence to operate a nursing home as part of its assets and the terms of the collective agreement being honoured on its behalf by Price. On the evidence before the Board, we are not prepared to find that Maritime became a successor employer due to a sale of a business within the meaning of section 63 of the Act. The mere happenstance of having loaned and trying to protect money to an unsuccessful employer is not, in itself, a reason to find a sale of a business.

15. A number of decisions of other Canadian Labour Relations Boards were cited to the Board. None of the cases cited were directly on point, see *Ontario Worldair Ltd.* 81 CLLC ¶16,117; *Fraser Valley Arenas (1975) Ltd.* (1979) 3 Can. L.R.B.R. 195; and *Uncle Ben's Ltd.* (1979) 2 Can. L.R.B.R. 126. These cases considered different situations where a receiver or a manager or a receiver and a manager or a mortgagee in possession were involved and whether there was a difference between privately-appointed receivers and



managers as opposed to court-appointed receivers and managers. It is clear that there are valid distinctions to be made in the field of commercial law in these areas for the property rights of the parties may be differently affected depending on the terms of the private instrument under which a receiver or manager are appointed compared with a court-appointed receiver or manager. It was agreed by counsel before the Board that from a labour relations point of view no distinction ought to flow from whether receivers and managers are appointed under the terms of a private instrument or by a court. The Board agrees that obfuscation ought to be avoided by all means. (*cf. Price Waterhouse Ltd.*, [1983] OLRB Rep. June 000)

16. This Board is in sympathy with this approach. In our view, the question of whether there has been a sale under section 63 is best approached by identifying the employer which is bound by the bargaining rights, the business or part thereof which is affected by the application, the function actually being performed by the receiver and/or manager, whether there has been an actual sale, lease, transfer or other manner of disposition of a business or part of a business and the identity of the person to whom such a sale, lease, transfer or other manner of disposition has occurred. We therefore find that the consequences upon labour relations flowing from a court-appointed receiver are no different than those which result from the private appointment of a receiver.

17. This application under section 63 is dismissed for the foregoing reasons. Although the applicant raised the question of the application of section 1(4) to this proceeding, neither evidence nor argument were addressed on this point. In these circumstances, the request for relief under section 1(4) is dismissed.

18. It was common ground among counsel that the board of arbitration had awarded retroactive pay to the employees of Chateau in the amount of \$100,000. This award was released during the period when Price was the receiver and manager. Price has paid \$40,000 to the employees of Chateau. This amount represents the portion of the retroactive pay which accrued during the term of Price's stewardship. There remains the issue of how the applicant is to obtain the outstanding \$60,000 for the employees. It was the position of the applicant that since Price and Maritime had benefited commercially they ought to be responsible for this amount. This approach may be described as the well-lined pocket approach. While the Board has every sympathy for the employees in satisfying their reasonable expectations, there is no basis in this application for tapping the supposed well-lined pockets of a receiver and manager or an assurance company (or trust company, bank or private investor) merely because they have supposedly benefited in commercial relations with their employer. While it may be true that a lender of money has benefited from the labours of the employees, it may also be true that the money supplied has helped to create jobs, financial expansion and supplied liquidity during problems in cash flow and paid wages to the employees. There are clearly potential benefits on both sides of the relationship.

19. In closing, the Board notes that Price has commenced a proceeding in the Supreme Court of Ontario with a view of asking directions concerning the priorities among unsecured creditors. The applicant was invited to address the court with respect to the interests of the employees. The applicant did attend and present argument. A decision has yet to be released on this request for directions.

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**0408-83-U Local 280, International Beverage Dispensers' and Bartenders' Union, Complainant, v. Ramada 400/401, Respondent**

**Arbitration - Practice and Procedure - Unfair Labour Practice - Repudiation of trade union or collective agreement not issue - Real issue scope of bargaining unit - Board deferring to arbitration**

**BEFORE:** G. Gail Brent, Vice-Chairman and Board Members A. Grant and W. F. Rutherford.

**APPEARANCES:** *Beth Symes for the applicant; W. J. McNaughton, C. Wartman, J. Kaptyn and S. Kaptyn for the respondent.*

**DECISION OF THE BOARD;** July 14, 1983

1. The original complaint as filed by the Union alleged a violation of section 43 of the *Labour Relations Act*. With the consent of the respondent, the Board allowed the complainant to amend the complaint to abandon the section 43 allegations and to allege violations of sections 64, 67, 50 and 49. It was agreed that the Board would hear the submissions of the parties regarding the question of whether it should exercise its discretion to hear the complaint and then adjourn pending a decision on whether the matter would be heard without hearing the merits of the complaint as amended.

• • •

3. At the hearing the Union made the following allegations in relation to its complaint as amended:

The respondent has failed to recognize the Union as the bargaining agent for the employees in the bargaining unit of Waves. Namely, it has failed to remit union dues for these employees; failed to have them join the union; failed to pay health and welfare benefits for these employees; and has made separate agreements with these employees.

On April 22, 1983 the union met with John Kaptyn, the owner, and Ken Dutton, the general manager of the respondent, concerning the application of the scope clause of the collective agreement to the employees of Waves. At that meeting Kaptyn gave Dutton authority to negotiate with the union and to come to an agreement.

On April 29th the union met again with Ken Dutton, the general manager of the respondent. At that time the union and Mr. Dutton agreed that the scope clause covered the employees of Waves, that the employees of Waves would be paid union wages, and that all employees of the respondent would be placed under the union's health and welfare plan. The agreement was never reduced to writing. The union agreed to have the carrier of the plan send the details of the plan to Mr. Dutton.

On May 3, 1983 the carrier sent to Dutton the details and enrollment card for the plan. Shortly thereafter Dutton told the union that, on advice of their lawyer, the respondent would not recognize the collective agreement because the union did not have successor rights.

On May 11, 1983 the union sent to Dutton a copy of the Board's decision of May 13, 1982 concerning successor rights. The respondent has refused to recognize the union as the bargaining agent for craft employees of the respondent and to abide by the agreement of April 29, 1983.

4. The background facts necessary for the disposition of the issue before us are not in dispute and, with the agreement of the parties, the Board accepted them without hearing evidence. On March 16, 1976 the complainant was certified as the bargaining agent for "all full-time and part-time tapmen, bartenders, alcoholic beverage waiters, male or female barboys, and improvers in the employ of Seaway Hotels (Ontario) Limited in Metropolitan Toronto save and except managers and those above the rank of manager". On November 15, 1976 the complainant was certified as bargaining agent for "all full-time and part-time, male and female bartenders, tapmen, barboys and improvers in the employment of Seaway Hotels (Ontario) Limited in the area known as The Hook and Ladder Club in the Beverly Hill Hotel, 1677 Wilson Avenue, Downsview, Ontario".

5. In this complaint we are only concerned with the Beverly Hills Hotel, as it then was. For our purposes, it can be stated that the two certificates were covered by one in the collective agreement which dealt with the then Beverly Hills Hotel. On June 4, 1980 a collective agreement was entered into between the complainant and "Rodeway Inn formerly known as "Beverly Hills Hotel". That collective agreement contained the following provision in "Article 2 - Scope":

This Agreement applies to all full-time and part-time male and female employees employed in the beverage departments in the employer's licensed establishment, as tapmen, bartenders, beverage waiters, (including waiters who operate automatic beer dispensers or other automatic dispensing equipment), bar boys and improvers and any other new classification relating to the serving of alcoholic beverages. In the Trophy Room, Hall of Fame Room, PLUS the Bartenders and Bar Boys in the Hook and Ladder Club.

6. On or about March 4, 1982 Rodeway Inns sold the business to Captain Developments Limited, the respondent. On May 13, 1982 the Board declared that the respondent was the successor employer to Rodeway and bound by the collective agreement of June 4, 1980. The respondent submitted union dues for thirteen employees on May 21, 1982. On May 22, 1982 the respondent closed down operations at the former Beverly Hills Hotel. All employees were paid to the end of May and the complainant was given advance notice of the closure.

7. By March, 1982 when the respondent acquired the business, the operation was a beverage room and the Hook and Ladder Club had ceased to exist as a supper club. The respondent had been engaged in discussions with Ramada Inns prior to March, 1982

with the intention of gaining a franchise to be operated at the former Beverly Hills location. The image and a condition of gaining the franchise was to give up the beverage rooms. Accordingly, the respondent decided to close down the operation, get rid of the beverage rooms and engage in renovations. The liquor licences which had been transferred from Rodeway were surrendered to the Liquor Licence Board of Ontario.

8. Between May 22, 1982 and sometime in December, 1982, for our purpose, the hotel was closed. When it re-opened the former beverage room areas had been converted to meeting rooms and the former coffee shop had been converted to a dining lounge and was licensed as such. The latter lounge is known as Waves and is the room referred to in the complaint. The meeting room area is now covered by a dining lounge licence so that dinner meetings, etc. can be accommodated.

9. The former coffee shop area was not covered by the collective agreement. When Waves opened, waiters, waitresses and bartenders were hired for the room. They were not hired through the complainant and no dues have been remitted for any of them.

10. The complainant had served Rodeway with a notice to bargain in February, 1982; however, the complainant is not alleging that there has been any bargaining in bad faith or that the dispute between the parties has anything to do with bargaining at all.

11. The respondent has indicated, in response to the allegations made in the amended complaint, that it does recognize the complainant as bargaining agent for all employees in the bargaining unit as defined in the collective agreement and that it does consider itself bound by the collective agreement; however, it does not consider that it has any employees who come within the scope of the bargaining unit as defined by the collective agreement.

12. The matter to be determined in this decision is whether the Board will exercise its discretion to hear the matter or whether this is a matter of collective agreement interpretation which should be determined by a board of arbitration.

13. The applicant referred us to several authorities concerning the circumstances under which the Board will not defer to arbitration. In *Valdi Inc.*, [1980] OLRB Rep. August 1254 it was noted in paragraph 7 that the Board would tend to exercise its discretion to hear matters in the following situations.

... where key provisions of *The Labour Relations Act* require important elaboration and application or where the employer's or trade union's conduct represents a total repudiation of the collective bargaining process...

In *Silverwood Dairies*, [1981] OLRB Rep. March 321, the Board reaffirmed the decision in *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577 when it quoted the following from that case in paragraph 32:

The long-standing practice of the Board has been to defer to the arbitration procedures established under section 37 [now 44] of the Act to resolve all differences between the parties arising from the



interpretation, application, administration and alleged violation of a collective agreement when complaints of this type have been brought under the Act. Where the complaint involves both the alleged unfair labour practice the Board has maintained its practice of deferral where satisfied that the merits of both the alleged collective agreement breach and the alleged unfair labour practice can be dealt with at arbitration.

That passage went on to comment about how the Board would conduct itself in situations where there has been an alleged unfair labour practice and a related breach of the collective agreement.

14. In the case before us the respondent has not repudiated the trade union nor has it asserted that it is not bound by the collective agreement. The sole matter to be determined is really the scope of the bargaining unit. That matter can be fully and reasonably determined by a board of arbitration interpreting the scope clause in the collective agreement. Once it is determined whether Waves falls within the scope clause, then the issues of dues deduction, health and welfare benefits etc. will all be resolved. If there is any argument to be based on estoppel arising out of the alleged agreement made with the complainant by Mr. Dutton, then that is something which can be resolved as an aspect of interpretation. We see no reason why we should not follow our usual procedure of deferring to a board of arbitration for the resolution of what is, in essence, both a question of the interpretation of a collective agreement and a matter which will be completely resolved once the interpretation of the collective agreement is determined.

15. For all of the reasons set out above the Board will not exercise its discretion to hear this matter and the complaint is therefore dismissed.

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### **0068-83-M Rantex Brushes Inc., Employer, v. United Electrical, Radio & Machine Workers of America, Local 542, Trade Union**

Arbitration - Collective Agreement - Reference - Whether collective agreement existed - Whether agreement dealt with safety and attendance bonus for arbitrator to decide - Whether events occurred during freeze period - Whether grievance procedure followed matter for arbitration - Minister having authority to appoint under expedited arbitration provisions

BEFORE: Ian Springate, Vice-Chairman, and Board Members W. G. Donnelly and P. J. O'Keefe.

*APPEARANCES: William S. Challis and Hugo Maltarp for the employer; A. J. Peters and J. Losell for the trade union.*

### **DECISION OF THE BOARD; July 28, 1983**

1. Pursuant to the provisions of section 107 of the *Labour Relations Act*, the Minister has referred to the Board the question as to whether he has authority to appoint a single arbitrator under section 45 of the Act.

2. On November 25, 1980, the trade union was certified as the bargaining agent of certain of the employer's employees. On April 7, 1981 the parties entered into a memorandum of settlement which provided as follows:

"MEMORANDUM OF SETTLEMENT

The term of the collective agreement shall be from April 1, 1981 to October 31, 1982.

All matters previously settled and agreed to by the parties shall be incorporated.

Effective date of ratification, Schedule "A" Wage Scales and Classifications referred to in Article 23 of the collective agreement and appended hereto shall form part of the collective agreement and be incorporated into these minutes of settlement. The parties agree to incorporate into Schedule "A" language to the effect that the positions of Lead Hand shall not be subject to the job posting provisions of article 18. The parties also agree to incorporate into Schedule "A" language to the effect that the position of Crimper Operator 1 may only be filled on a progression basis from the position of Crimper Operator 11. The parties also agree to incorporate into Schedule "A" language to the effect that the company reserves the right to transfer employees from job to job as is currently its practice.

DATED at Barrie this 7th day of April, 1981

Hugo Maltarp  
FOR THE COMPANY

Marie Peters  
FOR THE UNION"

3. Although the issue was not addressed at the hearing, we gather from the conduct of the parties that the memorandum of settlement was properly ratified. Subsequent to the signing of the memorandum of settlement, the trade union put together a booklet containing its version of the collective agreement. The employer takes no objection to the correctness of most of the booklet. The employer does not, however, accept as correct the final Schedule "A" as drafted by the union, and in particular a provision in the schedule which provides as follows:

"July 1, 1981 - pay out safety & attendance bonus - and every three months thereafter."

4. By the terms of the memorandum of settlement, the first collective agreement between the parties was due to expire on October 31, 1982. On or about October 18, 1982 the union requested that the Minister of Labour appoint a conciliation officer to assist the parties to negotiate a new collective agreement. A conciliation officer was appointed, but proved unsuccessful in helping the parties to reach a new agreement. On December 14, 1982 the Minister of Labour issued a report indicating that he would not be appointing a conciliation board.

5. On or after January 6, 1983 the trade union filed a grievance with the employer which read as follows:

"REGISTERED

UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF  
AMERICA

### GRIEVANCE REPORT

Name UE Local 542  
 Date January 6 83  
 Address \_\_\_\_\_  
 Department \_\_\_\_\_ Operation \_\_\_\_\_ Clock No. \_\_\_\_\_  
 Shop Rantex Brushes Inc.  
 Nature of Grievance \_\_\_\_\_

The company has violated schedule "A" of the collective agreement by not paying the employees their pay out Safety & Attendance Bonus for the period of October 1, 1982 until the time of their layoff December 17, 1982, due them December 31, 1982.

We request the company pay the monies owing immediately.

This grievance is filed under Article 7:03 of the collective agreement, since the company is refusing the employees entrance into the plant.

A list of the employees affected is attached.

On behalf of the union  
 (A. J. Peters)  
 A. J. Peters, UE National  
 Co-ordinator

(Ron Bruce)  
 Ron Bruce, Chief Steward

(Dave Maxwell)  
 Dave Maxwell, Steward"

6. On or about January 26, 1983, the trade union requested that the Minister appoint a sole arbitrator to adjudicate the grievance pursuant to the provisions of section 45 of the Act. The applicable portions of section 45 read as follows:

"45.-(1) Notwithstanding the arbitration provision in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement may request the Minister to refer to a single arbitrator, to be appointed by the Minister, any difference between the parties to the collective agreement arising

from the interpretation, application, administration of alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) Subject to subsection (3), a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after thirty days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

• • •

(4) Where a request is received under subsection (1), the Minister shall appoint a single arbitrator who shall have exclusive jurisdiction to hear and determine the matter referred to him, including any question as to whether a matter is arbitrable and any question as to whether the request was timely."

7. On January 28, 1983 counsel for the employer wrote to the Director of the Office of Arbitration objecting to the appointment of an arbitrator by the Minister in the following terms:

"I am the solicitor for Rantex Brushes Inc., the employer in the above noted Request for Appointment of Arbitrator under Section 45 of the Act.

The employer respectfully submits that the Minister has no jurisdiction to appoint an arbitrator under Section 45 and that the Union's request for same must therefore be denied. The basis for this objection is as follows.

On October 18, 1982, the Union applied for conciliation in respect of bargaining for renewal of a collective agreement between the parties due to expire on October 31, 1982. Following conciliation, the Minister released a "no board" report to the parties on December 14, 1982, (a copy of which is enclosed) and the strike/lockout deadline fell at midnight on December 30, 1982. The parties had met in mediation on December 30 and, following a breakdown in negotiations, the Union was advised that a lockout would commence at 12:01 a.m. on December 31. This advice was confirmed to the Union by telegram and registered letter, copies of which are also enclosed.

As you can see from the face of the grievance (dated January 6, 1983 and received by my client on January 12, 1983), it relates to a Safety and Attendance Bonus which the Union has alleged was due employees on December 31, 1982. Accordingly, both the alleged



violation and the purported filing of a grievance occurred subsequent to the expiry of the freeze period under Section 79 of the Act. In these circumstances, the Union cannot be said to be "a party to a collective agreement", nor can there be "any difference between the parties to a collective agreement arising out of...[an] alleged violation of the agreement." The issue herein is not simply one of arbitrability, but goes to the jurisdiction of the Minister to make any appointment at all where the preconditions to the exercise of his authority under Section 45 are not met.

I wish to point out that the issue of a safety and attendance bonus has been the subject of negotiation between the parties. Prior to the lockout, both parties had been negotiating for a renewal agreement effective commencing November 1, 1982 and had discussed elimination of any bonus. Now that negotiations have broken down, it would appear that the Union is seeking to achieve an unfair advantage in bargaining through the back door of a spurious grievance.

Certain other irregularities appear on the face of the Request, relating to the nature of the grievance at paragraph 1(h), the steps taken in the grievance procedure at paragraphs 4 and 5 and the certificate of service. At no time was the Request personally delivered to the named recipient, Hugo Maltarp, as attested to by Mr. Peters. I would assume that proper service is also a factor in your consideration of the Request.

This objection is taken without prejudice to any other defences available to my client, including the arbitrability of the grievance."

The trade union wrote a response to this letter claiming that the Minister had authority to appoint an arbitrator. In its letter, the trade union contended that "the grievance in question deals with monies earned and owing between the period of October 1, 1982 and December 17, 1982, to be paid to employees on or after January 1, 1983".

8. Following certain further correspondence between the parties and the Office of Arbitration, the Minister made his reference to the Board. The issues referred to the Board were set out in the reference as follows:

"6. Specifically, the questions are:

- i) Whether the incident which gave rise to the grievance occurred during either the term of the collective agreement or the statutory freeze period established by section 79(1) of the *Labour Relations Act*.
- ii) if the answer to (i) is negative and the incident occurred after the expiry of the statutory freeze period, does the Minister have the authority to make the requested appointment.

7. The Minister hereby refers these questions concerning his authority to the Ontario Labour Relations Board pursuant to section 107 of the *Labour Relations Act*."

9. At a hearing before the Board, counsel for the employer contended that the Minister lacked jurisdiction to appoint an arbitrator for three reasons. Namely:

1) There was not, and had not been, any collective agreement between the parties containing a provision requiring the payment of a safety and attendance bonus.

2) The events giving rise to the grievance occurred after the expiry of the collective agreement and after the expiry of the section 79 statutory "freeze period".

3) The grievance was, in any event, improperly filed as a policy grievance and the grievance procedure was not properly followed.

10. In dealing with these issues, it should be noted that in this type of proceeding it is not the function of the Board to rule on ultimate correctness of the positions adopted by the parties, but only to advise the Minister with respect to his authority to appoint an arbitrator. Further, it is to be noted that pursuant to both subsections (1) and (4) of section 45, an arbitrator once appointed has the authority to deal with "any question as to whether a matter is arbitrable".

11. We turn first to deal with the employer's contention that there never was an applicable collective agreement containing the provision which the union contends the employer violated. Section 45 of the Act states that "a party to a collective agreement" may request the appointment of an arbitrator. Lacking an applicable collective agreement, it would appear that the Minister lacks authority to appoint an arbitrator, and in any event such an appointment would serve no useful purpose. Notwithstanding the April 7, 1981 memorandum of settlement, counsel for the employer did not acknowledge that a collective agreement was ever in force between the parties. Employer counsel strongly contended that if there had in fact been such a collective agreement, the agreement had not contained a provision respecting the payment of a safety and attendance bonus. On the material before us, we are satisfied that when the parties entered into the memorandum of settlement, incorporating as it did certain wage rates and other matters agreed to between the parties, they were entering into an agreement which met the definition of a "collective agreement" in section 1(1)(e) of the Act. In this regard see: *Windsor Table and Metal Inc.* [1978] OLRB Rep. Sept. 882 and *Coulter Cooper & Brass Limited* [1981] OLRB Rep. May 519. Accordingly, we are satisfied that the employer and the trade union were parties to a collective agreement. A separate question is whether the collective agreement contained a provision respecting the payment of a safety and attendance bonus. In our view, this question, involving as it does the interpretation of the collective agreement, falls within the authority of a section 45 arbitrator to decide. Accordingly, the fact that the parties disagree as to whether the collective agreement contains a clause respecting a safety and attendance bonus does not deprive the Minister of the right to appoint an arbitrator under section 45.

12. We turn now to consider the contention of the employer that the events being grieved about occurred after the expiry of the collective agreement and the statutory freeze period. Pursuant to the memorandum of settlement, the collective agreement was to expire on October 31, 1982. Pursuant to section 79(1) of the Act, the terms and conditions of this agreement were "frozen" until fourteen days had elapsed after the Minister had released to the parties a notice that he did not consider it advisable to appoint a conciliation board. As already noted, the Minister issued such a notice on December 14, 1982. Pursuant to section 113(3) of the Act, the notice was deemed to have been released two days after this date, namely, December 16, 1982. Fourteen days later would have been December 30, 1982. Accordingly, the section 79(1) statutory freeze period would have come to an end on December 30, 1982. The employer accepts as correct the Board's conclusion in the *Hamilton Civic Hospital* case [1983] OLRB Rep. March 371 to the effect that under section 45 the Minister "...has the authority to appoint (an arbitrator) where the incident or event giving rise to the grievance occurs...during the section 79(1) statutory freeze period". However, the employer contends that the incident giving rise to the grievance, that is, the alleged non-payment of a safety and attendance bonus, occurred after the expiry of the freeze period on December 30, 1982.

13. At the hearing, the trade union acknowledged that any bonus, if payable, would have been payable on or after December 31, 1982, that is after the expiry of the freeze period. The trade union submits, however, that the right of employees to a bonus accrued over a period between October 1, 1982 and December 17, 1982, that is during both the term of the collective agreement and during the freeze period, and that it is now simply seeking the payment of the monies owing.

14. As already indicated, we are satisfied that no collective agreement, or statutory extension of the terms of the collective agreement, was in place on or after December 31, 1982. As a matter of law, we are further satisfied that no event occurring on or after December 31, 1982 could give rise to a proper grievance and that the Minister has no authority to appoint an arbitrator to deal with a grievance arising out of events on or after December 31, 1982. The trade union, however, contends that its claim is based on events *prior to* December 31, 1982. This, in our view, is a claim that can properly be adjudicated by an arbitrator appointed under section 45. Such an arbitrator would have the authority to interpret the collective agreement and rule on the correctness of the union's allegation that the terms of the collective agreement had been breached.

15. As for the employer's contention that the grievance was improperly filed as a policy grievance and that the union had failed to follow the grievance procedure set out in the collective agreement, these are matters which turn on the interpretation to be given to the relevant provisions in the collective agreement. Interpreting the collective agreement is a matter for an arbitrator, not this Board in the context of a referral from the Minister. Further, as already noted, section 45(4) of the Act, expressly provides that an arbitrator appointed by the Minister shall determine "any question as to whether a matter is arbitrable and any question as to whether the request (under section 45(1)) was timely". Given these considerations, we are satisfied that the employer's allegations do not deprive the Minister of the jurisdiction to appoint an arbitrator, but rather that the allegations are matters which can be placed before such an arbitrator for determination.

16. Quite apart from the employer's contention that the Minister lacks authority to appoint an arbitrator, the employer contends that even if he has such authority the Minister should not make the appointment. In the employer's view, it would be more appropriate for this Board to deal with the merits of the dispute between the parties rather than an arbitrator. In support of this contention, the employer's counsel correctly noted that rather than taking an alleged violation of the terms of a collective agreement during the freeze period to arbitration, a party can instead file a complaint with this Board under section 89 of the Act alleging a violation of the statutory freeze. It is to be noted, however, that in the instant case the union contends that its grievance relates in part to a period prior to the statutory freeze period when the collective agreement was still in operation. This part of the union's claim could not be dealt with by this Board under a section 89 complaint. More importantly, no complaint under section 89 is before the Board. There is before the Board only a reference from the Minister relating to his authority to appoint an arbitrator, and in the circumstances we feel it appropriate to reply to the question posed by the Minister.

17. The question posed by the Minister was as follows:

- "i) Whether the incident which gave rise to the grievance occurred during either the term of the collective agreement or the statutory freeze period established by section 79(1) of the *Labour Relations Act*.
- ii) If the answer to (i) is negative and the incident occurred after the expiry of the statutory freeze period, does the Minister have the authority to make the requested appointment."

In answer to this question, we would refer to the trade union's contention that the grievance relates to events which occurred both during the term of the collective agreement and the statutory freeze period. While we express no opinion with respect to the merits of the trade union's claim, we are satisfied that an arbitrator would have the jurisdiction to determine the issue and to decide on whether the trade union's claim is, in the circumstances, a valid one.

18. In light of the above, the Board is satisfied that the Minister has the authority to appoint an arbitrator under section 45 of the Act to deal with the matters arising out of the grievance filed by the trade union.

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**0488-83-R** Harold Fairweather, Applicant, v. Canadian Union of Public Employees, Respondent, v. **Salvation Army House of Concord**, Intervener

Termination - Timeliness - Application made during normal open-period - Effect of *Inflation Restraint Act* to extend collective agreements and postpone open-period - Reasoning in *Broadway Manor* case also applicable to termination applications - Termination application untimely

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members I. M. Stamp and A. Hershkovitz.

**APPEARANCES:** 4 Marshall Garnick, H. Fairweather, Whitney Meade and Wally W. Wilson for the applicant; Helen O'Regan and Allan Dymond for the respondent; Norman A. Keith and Major Bowes for the intervener.

### **DECISION OF THE BOARD;** July 21, 1983

1. The name of the respondent is amended to read: "Canadian Union of Public Employees".

2. This is an application for a declaration terminating bargaining rights, filed pursuant to the provisions of section 57(2) of the *Labour Relations Act*. That section provides:

57.(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;
- (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

3. The collective agreement here in question provided for an expiry date of June 30, 1983. The application was filed on June 6, 1983, within the two months prior to June 30, 1983. The parties are, however, governed by the provisions of the *Inflation Restraint Act, 1982*, and the respondent trade union relies on the Board's decision in *Fiddicks Nursing Home* and *Broadway Manor Nursing Home*, [1983] OLRB Rep. Jan. 26, in asking the Board to find that this application is untimely.

4. The Board in the two cases referred to above (which we will refer to as "*Broadway Manor*"), after a careful consideration of the provisions of the *Inflation Restraint Act, 1982* and the *Labour Relations Act*, determined that the former Act in effect overrode the provisions of the *Labour Relations Act* by extending for a period of one year collective agreements otherwise expiring within the restraint period. This, the Board noted, had the effect of postponing what would otherwise be the "open period" for the purpose of testing questions of representation. The case before the Board in *Broadway Manor* in fact involved a displacement application for certification by a rival trade union, but the Board's analysis and comments in the case made it clear that it felt that applications for declarations to terminate bargaining rights stood in a parallel situation. As the Board observed at paragraph 20 of that decision:

20. ... If the open period is closed for purposes of filing a timely displacement application for certification, it must also be closed for purposes of ascertaining the timeliness of an employee application to terminate bargaining rights and for purposes of giving notice to bargain under section 53 of the *Labour Relations Act*.

And further at paragraphs 29 and 30:

29. The language of section 13 of Bill 179, when read in the context of the Bill as a whole, forces us to the conclusion that it was intended to extend the collective agreements brought within its ambit. The effect of this interpretation is to close out the open periods provided in the *Labour Relations Act* at the commencement of the last two months of the operation of the collective agreement. This interpretation has a dramatic effect upon the operation of the *Labour Relations Act* in respect of representation applications, notice to bargain, appointment of conciliation officers and the right to strike or lockout. However, section 13 of Bill 179 is expressly made to operate "notwithstanding any other Act". These are forceful words which, in the face of the definition of a collective agreement contained in Bill 179, as including a collective agreement under the *Labour Relations Act*, and the interrelationship between the two statutes, and in the absence of any saving language as is used in respect of the *Human Rights Code* and the *Employment Standards Act*, speak to the awareness of the legislature of the conflict between the two statutes and its intention that Bill 179 prevail.

30. ... In our view, the relevant language of Bill 179 does not admit to more than a single reasonable interpretation. The Bill extends the operation of collective agreements which would otherwise cease to

operate and, in so doing may render untimely a representation application or prevent the appointment of a conciliation officer and consequently abridge the right to strike or lockout under the *Labour Relations Act* or the right to an arbitrator under the *Hospital Labour Disputes Arbitration Act*.

5. The analysis of the Board in *Broadway Manor* did not turn on any specific language in section 5 of the *Labour Relations Act* (the certification section), and, once again, clearly saw displacement applications for certification and applications to terminate bargaining rights as being on the same footing. The respondent trade union points out that if it were otherwise, employees wishing to change bargaining agents at the point which *Broadway Manor* indicates they are not entitled to, need only bring a termination application and then a short time later have their new choice of union apply for certification. Counsel for the applicant sought to justify the apparent anomaly of the *Inflation Restraint Act* of treating the two types of applications differently on the basis that the real purpose of the Act is simply to restrain compensation, and the motivation of employees seeking to adopt the “non-union” option may have nothing to do with a desire for increased compensation. He also submits that the Board ought to hear the evidence of motivation in each case, to determine whether or not such is the case.

6. But the same argument could be made with respect to displacement applications, so that the applicant is really asking the Board to reconsider its decision in *Broadway Manor*. The Board finds no reason to do so. The Board’s conclusions in *Broadway Manor* did not turn on any questions of motivation, but rather on a careful analysis of the language of the two Acts, and the relationship of the statutory scheme for representation applications to the temporary impact of the *Inflation Restraint Act* on the scheme for collective bargaining as a whole. In line with the Board’s reasoning in *Broadway Manor*, we find that the extension of collective agreements by the *Inflation Restraint Act* has the effect of postponing the “open period” for termination applications as well.

7. The intervener employer, however, points to section 57(2)(c) of the *Labour Relations Act*, and argues that this subsection distinguishes the present situation from that of an application for certification under section 5. He points out that the subsection contemplates the preservation of the initial “open period” where the collective agreement has been extended by the parties’ default, and relies in that regard on the decision of the Board in *Canadian Chemical Workers Union*, [1980] OLRB Rep. July 952. In that case the collective agreement contained the usual clause providing for the continuation of the agreement from year to year in the event that either party failed to give notice to bargain for its amendment. The union had failed to comply completely with the requirements for the giving of notice under the collective agreement, and a termination application was filed in what normally would have been the last two months of the agreement. The union sought to rely on its own failure to give proper notice to argue that the collective agreement had been hence extended for a further year, and that that extension rendered the application filed for termination untimely. The Board stated at paragraph 6, contemplating the provision of additional “open periods” in section 57(2)(c):

6. Section [57](2)(c) regulates the timeliness of termination applications in the case of collective agreements which provide that they will

continue to operate for a *further term* if either party fails to give a timely notice to bargain. The section sets out two alternatives when such applications might be untimely – both of which occur during the extended term. We do not think however, that the specification of open periods referable to the extended term, was intended to take away the open period which would have arisen in the normal course.

The instant case also involves a collective agreement which contains the usual form of termination clause, specifically:

#### ARTICLE 30 – TERMINATION

30.01 This Agreement shall remain in force until June 30, 1983, and shall continue in force from year to year thereafter unless in any year not more than ninety (90) days and not less than thirty (30) days before the date of its termination, either party shall furnish the other with a notice of termination of, or proposed revision to, this Agreement.

The employer argues that this language in the collective agreement brings section 57(2)(c) into play, and that the Board ought to apply its reasoning in the *Canadian Chemical Workers* case to find that in spite of the extension of the collective agreement, the initial “open period” survives as well.

8. That subsection, counsel concedes, by its own terms applies only where the extension of the collective agreement has been caused by the *default of the parties* to give proper notice. That is a matter wholly within the control of the parties themselves, as recognized by the Board in its reasoning in the *Canadian Chemical Workers Union* case, where the Board continued, also, at paragraph 6:

... In our view, an application for certification or termination can be made during the two months immediately preceding the nominal expiry date of the collective agreement even if that agreement provides for its continuation or renewal for a further term. The open period cannot be “closed” or “postponed” by the unilateral action of one of the parties.

That is a different situation entirely from one where the parties’ normal ability to bargain has, in advance, been postponed by statute.

9. But counsel argues that the Board ought to “stretch” the language of section 57(2)(c) to make it apply in the case of mandatory extension of the collective agreement by the *Inflation Restraint Act, 1982*. Even if the Board had the power to do that, the reason put forward by counsel in support of that request is that the *Inflation Restraint Act*, as the respondent conceded, renders the giving of notice to bargain essentially meaningless; in those circumstances, counsel argues, the Board should strain to find that the “open period” continues to exist for the purpose of a termination application. With all due respect to counsel, the Board would have thought that that circumstance pointed in the other direction. In this particular case, incidentally, the Board notes that timely



notice to bargain was given by the respondent on April 14, 1983, providing yet another reason why section 57(2)(c), by its terms, cannot apply. The Board's decision does not, however, rest solely upon this factor.

10. The final argument put forward by both the applicant and the employer is that the purported extension of the *Inflation Restraint Act, 1982* beyond its stated goal of "restraint of compensation in the public sector", to oust the normal procedures under the *Labour Relations Act* for the determination of representation questions, renders the *Inflation Restraint Act* in violation of the *Charter of Rights*. In this regard counsel point to the following sections of the *Charter*:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

\* \* \*

(d) *freedom of association*.

That argument, however, was made and dealt with in the *Broadway Manor* case. As the Board observed in *Broadway Manor*, the *Labour Relations Act* already places what have been considered to be necessary restraints on the right of access to changes in representation, particularly with respect to the timing of such access. In the Board's view, the further impact of the *Inflation Restraint Act* on these already-existing restrictions is not so fundamental as to bring that Act into conflict with the *Charter*.

11. It might finally be noted that, although not before this panel of the Board at the time that the present application was actually heard, a prior decision of the Board dealing with precisely this point has in fact been issued. In *Don Mills Foundation for Senior Citizens*, Board File No. 0049-83-R, released June 20, 1983, the Board wrote:

1. This is an application for termination of the respondent union's bargaining rights made pursuant to section 57(2) of the *Labour Relations Act*. Section 57(2)(a) provides that such application can only be made "after the commencement of the last two months" of operation of the collective agreement between the respondent union and the employer intervener. That agreement, by its terms, would expire on March 31, 1983 and this application for termination of bargaining rights was filed on April 20, 1983. Accordingly, looking only at the terms of the collective agreement and the *Labour Relations Act*, this application would be timely.

2. But it is not. While the collective agreement was in operation, the Legislature passed Bill 179, the *Inflation Restraint Act, 1982*. One of the features of that legislation was a statutory extension of the term of operation of existing public sector collective agreements. It is not

disputed that the Senior Citizens facility where the applicant works is subject to this legislation. Accordingly, the collective agreement extension provided for in the *Inflation Restraint Act, 1982* has the indirect effect of postponing the applicant's right to seek termination of the respondent's bargaining rights because such application can only be made during the last two months which the collective agreement continues to operate and this "open period" will have to be calculated with reference to the new end point caused by the statutory extension of the agreement's term of operation. The statutory language which produces this result was exhaustively examined in the Board's decision in *Broadway Manor Nursing Home*, Board File No. 1559-82-R, decision dated January 3, 1983, as yet unreported, and need not be repeated here. It suffices to say that the scheme which the Legislature has created under the *Inflation Restraint Act, 1982* has the effect of preventing this application from being considered at this time. The Board has determined, therefore, that, in accordance with its usual practice in respect of untimely termination applications, the present application must be dismissed.

12. For the reasons given, the present application must be dismissed as well.

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**2498-82-M Sperry Vickers Division Sperry Inc. Canada, Employer, v. International Association of Machinists and Aerospace Workers, District Lodge 717, Trade Union**

**Collective Agreement - Conciliation Reference - Employer withdrawing offer in good faith prior to ratification by union - Whether collective agreement existed upon ratification - Board finding no collective agreement and no bar to appointing conciliation officer - Reviewing application of doctrine of mutual mistake to collective agreement - Mutual mistake not affecting otherwise valid collective agreement**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

**APPEARANCES:** *M. P. Moran and Vera Brown for the employer; H. Goldblatt, R. B. McMillan and J. Atkinson for the trade union.*

**DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD; July 6, 1983**

1. This is a reference pursuant to section 107 of the *Labour Relations Act* in which the Minister seeks the opinion of the Board on the question of his authority to appoint a conciliation officer in the circumstances of this case. Specifically, the question is whether or not there is a collective agreement in operation between the parties.

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[*Extensive review of evidence omitted*]

22. Counsel for the employer submitted that the Minister has authority to appoint a conciliation officer because there is no collective agreement in force between the parties. It was his position that the Memorandum of Agreement was, in essence, merely a negotiated offer which was withdrawn by the employer prior to acceptance by the union through ratification. He acknowledged that in some circumstances the duty to bargain in good faith pursuant to section 15 of the Act might preclude the withdrawal of such offer, but stressed that in the present case the offer was withdrawn by the company in good faith as soon as it became aware that the union bargaining committee was construing that offer to include new C.O.L.A. money which was not part of the offer formulated by the company. Company counsel contended that the effect of the withdrawal of that offer, prior to its purported ratification by the membership, was to preclude any collective agreement from coming into existence. He submitted in the alternative that there is no collective agreement between the parties because the parties were never *ad idem* due to their mutual mistake concerning the C.O.L.A. clause. In the further alternative, he submitted that there is no collective agreement because the Memorandum of Agreement has not been ratified by the employer.

23. It was submitted on behalf of the union that the Minister is without authority to appoint a conciliation officer because there has been a collective agreement in force between the parties since January 17, 1983 when the membership ratified the Memorandum of Agreement. Union counsel submitted that the parties "had a deal" which the employer found, "in the cool light of the morning", not to be to its liking, and which the employer is now "trying to get out of". In the alternative, he submitted that any reasonably objective outsider would view the duly ratified Memorandum of Agreement as a collective agreement which includes a C.O.L.A. clause identical to that contained in the 1981-83 collective agreement. In support of that position, he emphasized the parties' longstanding practice of specifying in their memoranda of agreement all changes in language from previous collective agreements. He also contended that the Memorandum of Agreement required ratification solely by the union, and not by the employer.

24. Prior to the events which gave rise to the present proceedings, Mr. McMillan and Ms. Browne had always enjoyed a good professional relationship based upon mutual trust. Having regard to all the evidence, we have no doubt whatever that each of them honestly formed a different view of the manner in which the parties had agreed to resolve the C.O.L.A. aspect of their negotiations. On the one hand, Mr. McMillan and the other members of the union bargaining committee believed that in addition to the 35¢ fold in of C.O.L.A. from the previous collective agreement and the remaining 5¢ "float", the parties had agreed that the C.O.L.A. clause from the previous collective agreement would be included in the new collective agreement and would continue to generate "new money" (if the Consumer Price Index rose). That understanding was based primarily on the parties' longstanding practice of specifying in their memoranda of agreement all changes in language from previous collective agreements, and on Mr. McMillan's belated comment at the bargaining table that the C.O.L.A. clause contained "no years" but rather "just dates..." Ms. Browne and the other members of the company bargaining committee, on the other hand, believed that there would only be a 35¢ fold in of C.O.L.A., with a residual float of 5¢, and that there would be no "new money" generated by a C.O.L.A. clause in the new collective agreement. That understanding was based

primarily on the aforementioned change in the union's C.O.L.A. proposal from "as proposed" to "40¢ of C.O.L.A. folded in", the company bargaining committee's firm and oftstated resolve to settle within the "6 and 5" guidelines, and the fact that when the company negotiated on C.O.L.A., it traditionally negotiated "on just about every cent". The relative magnitude of the amount in issue can perhaps best be appreciated by noting that the (potential) 40 cents of "new C.O.L.A. money" is almost as large as the annual wage rate increases specified in "Comp. Proposal No. 3" (incorporated by reference into the Memorandum of Agreement).

25. Thus, there exists in this case what has traditionally been described in the law of contract as a "mutual mistake", as opposed to a "common mistake". The distinction between those two categories of bilateral mistakes is described as follows in Cheshire and Fifoot, *The Law of Contract* (8th Ed. London: Butterworths) at pages 202 and 203:

"In common mistake, both parties make the same mistake. Each knows the intention of the other and accepts it, but each is mistaken about some underlying and fundamental fact. The parties, for example, are unaware that the subject-matter of their contract has already perished.

In mutual mistake, the parties misunderstand each other and are at cross-purposes. A, for example, intends to offer his Ford Cortina car for sale, but B believes that the offer relates to the Ford Zephyr also owned by A."

(See also *Dalewood Investments Ltd., v. Maida* (1982), 40 O.R. (2d) 472 (Ont. C.A.)) The effect of a mutual mistake at common law is described in the following passage from pages 221 and 22 of that text:

"Let us first examine the case of mutual mistake, where each party is mistaken as to the other's intention, though neither realizes that the respective promises have been misunderstood. This situation would arise, for instance, if B were to offer to sell his Ford Cortina car to A and A were to accept in the belief that the offer related to a Ford Zephyr. In such a case, no doubt, if the minds of the parties could be probed, genuine consent would be found wanting. But, the question is not what the parties had in their minds, but what reasonable third parties would infer from their words or conduct.

Applying itself to this task, the court has to determine what Austin called 'the sense of the promise'. In other words, it decides whether a sensible third party would take the agreement to mean what A understood it to mean or what B understood it to mean, or whether indeed any meaning can be attributed to it at all. The promisor may have made his promise in one sense, the promisee may have accepted it in another. There may have been mistake of a fundamental character which caused the one to put a wrong interpretation upon the promise of the other. But it is for the court to decide what, if any, is the interpretation to be put on what the parties have said or done.



In a leading case, BLACKBURN, J., explained the attitude of the law. He said:

'If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.'

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The result is that if, from the whole of the evidence, a reasonable man would infer the existence of a contract in a given sense, the court, notwithstanding a material mistake, will hold that a contract in that sense is binding upon both parties....

Cases may occur, of course, in which it is impossible to impute any definite agreement to the parties. If the evidence is so conflicting that there is nothing sufficiently solid from which to infer a contract in any final form without indulging in mere speculation, the court must of necessity declare that no contract whatsoever has been created."

At page 231 of that text, the authors describe the manner in which courts having equitable jurisdiction have dealt with mutual mistake, as follows:

"Equity follows the law in holding that a mutual mistake does not as a matter of principle nullify a contract. In the nature of things, indeed, there is no room for equitable relief, since the court, after considering the mistake and every other relevant fact, itself determines the sense of the promise. In general, therefore, a party is not allowed to obtain rectification or rescission of a contract or to resist its specific performance on the ground that he understood it in a sense different from that determined by the court....

Nevertheless, the particular remedy of specific performance, since it is exceptional in nature, is one that lies very much within the discretion of the courts, and there certainly are cases in which it has not been forced upon a party who has mistaken the admitted sense of a contract...."

A mutual mistake does not generally make a contract void (or voidable) unless the mistake of one party is known to the other party, there is such ambiguity that a reasonable person could not draw any relevant inference concerning the terms of the contract which is alleged to have come into existence, or the mutual mistake goes to the heart of the entire contract or affects a matter that is fundamental to the contract as a whole. Absent such circumstances, the general rule is that a party is bound, in spite of his mistake if, whatever his real intention may have been, he conducts himself in such manner that a reasonable person would believe that he was assenting to the terms

proposed by the other party, and that the other party, acting upon that belief, enters into a contract with him. Similar principles apply to a situation in which a party conducts himself in such a manner that a reasonable person would believe that he was offering to contract on certain terms and the offeree, acting upon that belief, accepts the offer. (See, generally, Treitel, *The Law of Contract* (London: Stevens & Sons, 1979) at 217-219; Waddams, *The Law of Contracts* (Toronto: Canada Law Book Limited, 1977) at 94-98, 211-214, and 237-238; and Fridman, *The Law of Contract in Canada* (Toronto: Carswell, 1976) at 81-110.)

26. The issue of the effect of a mutual mistake on an otherwise valid collective agreement came before the Board in *Universal Handling Equipment Company Limited*, [1979] OLRB Rep. April 356. In that case the union had signed a memorandum of agreement (which provided for a dental plan) on the basis of a mistaken understanding that the benefits available under the dental were greater than was actually the case. In a reference to the Board under what is now section 107 of the Act, the union contended that since the parties had not been *ad idem* on the effect of that clause, the collective agreement was a nullity. In rejecting that contention, the Board wrote:

"12. A collective agreement is frequently the consummation of protracted, and arduous, bargaining, but the Act envisages that once the parties have reached agreement, and expressed that agreement in language deliberately chosen by them, they will remain bound for its prescribed term. Indeed, rescission of a collective agreement, before the expiry of its prescribed term, can only come about with the consent of both the parties, and the Ontario Labour Relations Board. The collective agreement is an essential element in an established legislative scheme to provide for stable employer/employee relations and industrial peace. The union's contention in this case would seriously undermine these important legislative objectives for, whenever it appeared that a collective agreement might be less advantageous than was at first supposed, a trade union or employer could claim that it had misunderstood the bargain, or was motivated by considerations which afterwards turned out to be misconceived. If this could be successfully argued, there would be few unimpeachable agreements in the Province of Ontario. Virtually every dispute as to the interpretation of an agreement could become a 'mistake' which would vitiate the entire agreement.

13. The supplementary dental benefit is a relatively minor part of this collective agreement, yet the union now contends that because it is less generous than anticipated the entire agreement must fall – or, more accurately, never existed. The Board simply cannot accept this contention. The Agreement accurately reflects precisely what the union bargained for, in precisely the terms which the union and the company accepted. Since the union had initiated the proposal for the new benefit and had in its possession a description of the coverage provided by Blue Cross Rider #2, it is difficult to understand how there could be any misunderstanding as to what it was bargaining for; but in any event, the Board is satisfied that there is a binding

collective agreement between the parties and that any issue which remains is one of interpretation which must be resolved pursuant to the arbitration provisions in the agreement.”

27. The issue has also been considered in the arbitral jurisprudence. In *Re Puretex Knitting Co. Ltd. and Canadian Textile & Chemical Union, Local 560* (1975), 8 L.A.C. (2d) 371 (Dunn), the company argued that there was no collective agreement between the parties because the memorandum of agreement which they had signed did not represent their consensus. In the alternative, the company sought to have the arbitrator exclude from consideration the clause in question, which stipulated: “all rates to be increased by 40¢” (as of a specified date). It was the union’s understanding that this would add 40 cents to employee wage rates over and above a 5 cent increase previously received by some of the employees as a result of an increase in the applicable minimum wage. The employer’s understanding, on the other hand, was that the 40 cents would be added to the wage rates set forth in the parties’ previous collective agreement, and that it would not be in addition to the 5 cent minimum wage increase. A majority of the arbitration board (at pages 373-374) rejected the employer’s contention that there was no collective agreement because the parties were not *ad idem* as to the legal effect of that provision:

“The parties entered into a written agreement, duly ratified it, and indeed implemented it in all but one of its provisions. Is the agreement then to be treated as void, or voidable, because it is made manifest that at its inception, one party held one opinion as to the legal ramifications of a single, if important, clause at odds with the opinion of the other party? For this board to so hold would set a most dangerous precedent to the process of collective bargaining. Clause by clause settlement of issues is the process of negotiation. To allow one party to say, ‘It was not our intention’, and thus avoid a written contract, or a settled term of the contract, is to invite chaos in the labour relations field. A party is entitled to rely on the objective meaning of the wording settled, and should not be concerned with the subjective interpretations that the other party may wish to make.

Nothing this board heard leads it to believe that either company or union had anything less than full knowledge of the factual matters forming the basis of their negotiation. The fact that certain workers had been raised five cents on October 1, 1974, by governmental intervention was known to both. Both company and union signed their agreement with full knowledge of all factual information necessary for their prior deliberations. Neither of them can now impeach that agreement by saying its wording does not represent their agreement because that wording meant different things to each of the parties, *ab initio*. It may well be that the legal meaning of the words they adopted have a meaning quite different to that which *either* party may have intended to give them. In order to preserve integrity to a contract that parties have taken care to reduce to writing, we must look to its words to establish intent, and not to what the parties, *post contractu*, may wish to say was their intent, albeit with honesty and sincerity.

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The intention of the parties must be construed objectively. All we have heard supports the conclusion that both parties signed the agreement without knowing that the other held a different view as to its interpretation. It therefore remains for us to implement and interpret the collective agreement according to its tenor, admitting evidence only in case of ambiguity as to any of its terms."

28. In *Re Aimco Industries Ltd. and United Steelworkers, Local 7574* (1976), 13 L.A.C. (2d) 338 (Beck), the sole arbitrator quoted with approval and applied the reasoning in the *Puretex* case. In that case, the collective agreement contained the following provision concerning additional quality control inspectors:

"Should the company add regular inspectors to the staff in addition to the present strength of five, the bargaining unit status of the additions will be negotiated with the union."

It was the union's understanding that any additional quality control inspectors would automatically be included in the bargaining unit, with only their wage rate and classification to be negotiated. The company, on the other hand, was of the view that the issue of whether new inspectors would be included in the bargaining unit was also a matter for negotiation. In considering the question of whether the contract doctrine of mutual mistake should apply so as to void all, or part of the collective agreement, and deciding against it, the arbitrator wrote as follows (at pages 343-344):

"The most likely scenario is that there is here a case of mutual mistake. That is, the union honestly believed that the additional quality control inspectors would be included in the bargaining unit, and the company honestly believed that the matter would be the subject of negotiations. The result is a case of mutual mistake with respect to art. 2.01. Common law contract doctrine with respect to a mutual mistake is that if the matter goes to the heart of the entire contract or at least affects some matter that is fundamental to the contract, then the whole contract is considered void. However, if the matter is not fundamental, and is severable, that is it might be cut out of the contract without rendering senseless what remains, then the particular clause alone is rendered void but the remainder of the contract stands. Thus if this were a pure point of contract law it would be held that art. 2.01 is severable and void which would leave the parties with no agreement as to the status of the quality control inspectors. In that case it is likely that the matter would be negotiated when the present collective agreement expires on June, 1977. However, arbitrators have been extremely loath to apply strict contract law to a collective agreement which has as its primary purpose the regulation of conditions of employment between employer and employee. To render an entire contract void, or even a single clause, is to leave the parties in limbo and possibly seriously disrupt not only the relations between the parties but the economic life of the particular industry. A similar situation arose in *Re Puretex*



*Knitting Co. Ltd. and Canadian Textile & Chemical Union, Local 560* (1975), 8 L.A.C. (2d) 371 (Dunn)....

I agree with the sense of the award of the majority in the *Puretex* case. I appreciate that another view would be to regard collective bargaining as a dynamic process with temporary stabilization of the employment relationship seen against a background of past negotiations and with further negotiations to come. Viewed in this light, the voiding of art. 2.01 because of mutual mistake is not seen to be so serious a matter – it is simply one of many matters to be resolved at the next stage of negotiations. I do not say that the position taken in the *Puretex* case is the one to be preferred in all cases. There may well be cases where the most just and equitable result is to void the particular clause – although I find it difficult to think of cases where it would be preferable to void an entire collective agreement. In this case, I find it preferable on the facts to apply the *Puretex* doctrine. Thus it becomes necessary to look to the agreement that the parties have reduced to writing to establish what is the agreement between them ....”

(See also *Re Ontario Jockey Club and Mutual Employees' International Union, Local 528* (1980), 28 L.A.C. (2d) 14 (Carter) in which a board of arbitration referred to the *Puretex* and *Aimco* awards, and commented (at page 18), in *obiter dictum*, that it is “highly questionable” whether the common law doctrine of mutual mistake “has an appropriate place in the law of the collective agreement”).

29. In a recent arbitration award between *Hamilton Medical Laboratories and County Medical Laboratory and Ontario Public Service Employees' Union* (dated June 15, 1983, as yet unreported) Mr. Springate, sitting as a sole arbitrator, was called upon to arbitrate a grievance concerning a memorandum of settlement which provided, in part, as follows:

“4. Wages effective January 1st 1981 – 12% across the board increase.

5. Wages effective April 1st 1982 – 5% across the board increase.”

The company contended that the 12 per cent and 5 per cent salary increases were all the employees were entitled to receive, and that no additional “incremental increase” was to be paid to employees as a result of movements through the salary scale based upon increased service. The union, on the other hand, argued that employees were entitled to receive not only the 12 and 5 per cent increases, but also incremental increases resulting from grid position changes due to increased service. The arbitrator found that at all relevant times the representatives of both parties acted in good faith but had a serious misunderstanding as to what they were agreeing when they signed the memorandum of settlement. After reviewing the pertinent Board and arbitral jurisprudence, the arbitrator expressed agreement with the reasoning contained therein and also made the following observations, with which we respectfully agree:

“In addition, I would add that one very good reason for not applying the common law contract doctrine of mutual mistake to a collective

agreement is that at common law a collective agreement is not a contract to which contract doctrine might apply. A collective agreement exists and is enforceable only by virtue of the *Labour Relations Act*. See *Young v. Canadian Northern Railway* [1931] 1 D.L.R. 645, a decision of the Judicial Committee of the Privy Council, and, more recently, the decision of the New Brunswick Court of Appeal in *Ste. Anne Nackawic Pulp & Paper Ltd. v. Canadian Paper Workers Union, Local 219*, 82 CLLC ¶14,216. The generic difference between a common law contract and a collective agreement was graphically illustrated in *McGavin Toastmaster Ltd. v. Ainscough et al.* (1975) 54 D.L.R. (3d) 1, where it was contended before the Supreme Court of Canada that employees who had engaged in an unlawful strike during the term of a collective agreement had thereby breached their individual contracts of employment such that the employer need not honor other terms of the applicable collective agreement. A minority of the Court were of the view that the employees were in breach of individual contracts of employment (which, in their view, were derived from both the collective agreement and the general law), and that on the basis of the common law doctrine of fundamental breach, the employer was not bound by the other terms of the individual contracts of employment, including the benefits stipulated for in the collective agreement. The majority of the Court, however, rejected this view. In delivering the majority decision, Chief Justice Laskin stated that the common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement, and in the following terms indicated that the common law doctrines of repudiation and fundamental breach are not applicable to a collective agreement:

'In my view, therefore, questions such as repudiation and fundamental breach must be addressed to the collective agreement if they are to have any subject-matter at all. When so addressed, I find them inapplicable in the face of the legislation which, in British Columbia and elsewhere in Canada, governs labour-management relations, provides for certification of unions, for compulsory collective bargaining, for the negotiation, duration and renewal of collective agreements. The *Mediation Services Act* which was in force at the material time in this case provided in s.8 for a minimum one-year for collective agreements unless the responsible Minister gave consent to earlier termination, and provided also for the making of collective agreements for longer terms, subject to certain termination options before the full term had run. Neither this Act nor the companion *Labour Relations Act*, R.S.B.C. 1960, c.205 [since repealed by 1973 (2nd Sess.), c.122, s. 151], could operate according to their terms if common law concepts like repudiation and fundamental breach could be invoked in relation to collective agreements which have not expired and where the duty to bargain collectively subsists.'

Section 44 of the *Labour Relations Act* contains the following provision relating to differences arising from the interpretation of a collective agreement:

‘44.-(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.’

This provision indicates that disputes over the interpretation of a collective agreement are to be resolved by arbitration. In my view, given section 44 of the Act as well as the Court, labour board and arbitration decisions referred to above, all differences between the parties as to how a collective agreement is to be interpreted, including instances where the parties had different understandings as to what the language they had agreed to actually meant, are to be resolved through arbitration, and not by voiding the collective agreement which would generally trigger a right to strike or lockout. Were it otherwise, there would be few collective agreements whose validity could not be challenged.”

We are confirmed in this view by the provisions of sections 52 and 57 of the *Labour Relations Act*, which are the Ontario equivalent of the British Columbia legislative provisions to which Chief Justice Laskin referred in his majority decision in the *McGavin Toastmaster* case.

30. Therefore, if the January 11, 1983 Memorandum of Agreement is in other respects a collective agreement for the purposes of the *Labour Relations Act*, the fact that the parties were mutually mistaken concerning the C.O.L.A. provisions encompassed by it would not vitiate that document. Accordingly, it is necessary to consider whether that document is, in other respects, a collective agreement.

31. Section 1(1) of the Act provides, in part, as follows:

“In this Act,

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(e) ‘collective agreement’ means an agreement in writing between an employer or an employers’ organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers’ organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers’ organization, the trade union or the employees, and includes a provincial agreement;

• • • •”

The Board has concluded in a number of cases that a memorandum of agreement similar in form to the January 11, 1983 Memorandum of Agreement can constitute a collective agreement. See, for example, *Coulter Copper & Brass Limited*, [1981] OLRB Rep. May 519; *Windsor Tube and Metal Inc.*, [1978] OLRB Rep. Sept. 882; and *Versaservices Limited*, [1972] OLRB Rep. Apr. 306. See also *Re Corporation of the City of Penticton and Canadian Union of Public Employees, Local 608*, (1977), 17 L.A.C. (2d) 315 (Smith); *Re Alcan Canada Foils and Printing Specialties & Paper Products Union, Local 466* (1976), 11 L.A.C. (2d) 352 (Schiff); *Giant Yellowknife Mines Limited*, 76 CLLC ¶16,002 (C.L.R.B.); and *International Brotherhood of Electrical Workers, Local 213, and John Inglis Co. Ltd.*, [1974] 1 Can. LRBR 481 (B.C.L.R.B.). However, that jurisprudence also indicates that where, as in the present case, the memorandum of agreement is subject to ratification (by one or both of the parties), it does not become a collective agreement until ratification has occurred. (See also *Unifin Division of Keeprite Products Limited*, [1976] OLRB Rep. June 286, and the cases cited therein.) Given the past practice of the parties, the fact that a high ranking official of the parent company was at the bargaining table, and the fact that the company bargaining committee was, to the knowledge of the union, in the practice of contacting higher management before making any proposal at the bargaining table which was beyond their original mandate, there is considerable force in union counsel's contention that the Memorandum of Agreement was subject to ratification by only the union, and not by the company. However, it is unnecessary to express a final opinion on that issue in the present case. Assuming without deciding that the Memorandum of Agreement required only union ratification, the Board is satisfied that, at most, it was a written offer by the employer which could become a collective agreement upon ratification by the union membership at a time when that offer remained outstanding. Under normal circumstances, the section 15 duty to bargain in good faith, and make every reasonable effort to make a collective agreement, would preclude an employer from revoking an offer set forth in such a memorandum prior to the date on which the parties contemplated that the offer would be brought before the membership for ratification. However, where, as in the present case, the employer, acting in complete good faith, becomes aware that the Memorandum of Agreement may not accurately reflect the terms of settlement which it reasonably contemplated would be presented to the employees for ratification, neither section 15 nor any other provision of the Act precludes the employer from notifying the union prior to ratification that the offer has been withdrawn, thereby rendering ineffective any purported subsequent acceptance thereof through ratification. In this regard, we also note that there was nothing in the Memorandum of Agreement itself which prevented the employer from taking that action in the circumstances of this case.

32. For the foregoing reasons, we find that the union's purported ratification of the Memorandum of Agreement on January 17, 1983 did not bring a collective agreement into effect between the parties as the offer contained in that document had been legally and properly withdrawn by the employer prior to the ratification vote.

33. Accordingly, the Board is of the opinion that, there being no collective agreement in operation between the parties, the Minister does have the authority to appoint a conciliation officer in the circumstances of this case.



## DECISION OF BOARD MEMBER JAMES A. RONSON;

1. I agree fully with the reasons for advising the Minister that there is no collective agreement in force. I disagree with the obiter reasoning of my colleagues concerning the application of the "doctrine of mutual mistake" to the facts of this case.

2. If one party promises to supply apples and the other party promises to take oranges, there is no *consensus ad idem* and there is no contract, be it a collective agreement or otherwise. In this case the "agreement" was not reduced to writing – and the issue is whether a clause in its entirety should be in or out of the collective agreement. It is not a matter of interpretation, and the money involved makes the issue into one that goes to the very roots of the agreement and the ongoing relationship between the parties. It is also not a matter of contractual remedy, as dealt with by the Supreme Court of Canada in the *McGavin Toastmaster* (supra) case. This is not a case where the parties agreed to something and are now asking the trier of fact to tell them what it is. Rather one party talked apples and the other oranges and they end up with a basket of neither.

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**2715-82-U; 0014-83-U; 0015-83-U; 0016-83-U; 0017-83-U; 0363-83-U Keith MacLeod Sutherland, Complainant, v. Labourers' International Union of North America, Labourers' International Union of North America Local 493, Angelo Fosco, A. E. Coia, M. A. Ross, and G. Mullen, Respondents**

**Charges – Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – Complainant's discharge from union office of Pension Administrator not proper subject of unfair labour practice complaint – Complainant's union membership cancelled – S.3 not requiring unions to admit applicants as members – Complainant not employee in unit not owed duty of fair representation – Meaning of "intimidation or coercion" in s.70 considered – Particulars not making out prima facie case of intimidation or coercion – Board not given watch-dog role over internal union matters – Complaint dismissed**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members E. J. Brady and B. K. Lee.

**APPEARANCES:** *Harry Kopyto, Anne Dawson and Keith Sutherland for the complainant; M. A. Ross for himself and Local 493; S. B. D. Wahl, G. Flook and G. Mullen for the other respondents.*

## DECISION OF THE BOARD; July 18, 1983

1. These are six complaints under section 89 of the *Labour Relations Act*, which have been consolidated by the Board pursuant to section 81 of the Board's Rules of Procedure. The consolidated style of cause has been amended at the request of the complainant, by removing Peter J. Fosco, D. L. Henry, Ugo Rossini, Rocco D'Andrea, John Stefanini and H. Mancinelli as respondents. Thus, the remaining respondents are

Labourers' International Union of North America (the "International"); Labourers' International Union of North America, Local 493 ("Local 493"); Angelo Fosco, the President of the International; A. E. Coia, the Secretary-Treasurer of the International; M. A. Ross, the Business Manager of Local 493; and G. Mullen, Secretary-Treasurer of Local 493.

2. It was submitted by Mr. Wahl (on behalf of the respondents whom he represents) that the Board should dismiss the consolidated complaints without a hearing on the ground that they do not make out a *prima facie* case for any relief under the *Labour Relations Act*. After hearing the submissions of Mr. Wahl and Mr. Kopyto concerning that preliminary matter on June 8, 1983, the Board reserved its decision and adjourned the proceedings pending disposition of that matter. (Mr. Ross elected to make no submissions to the Board.)

3. In an appendix to his initial complaint (File No. 2715-82-U) which was apparently filed without the assistance of counsel, Mr. Sutherland outlined various difficulties (allegedly) encountered by him as Pension Administrator of The Labourers' Pension Fund of Central & Eastern Canada, which culminated in his discharge from that position in January of 1982, followed by various attempts on his part to gain reinstatement or to be permitted to resign with written and verbal recommendations. While those matters may provide a basis for proceedings in other forums, they are not matters which fall within the jurisdiction of this Board. In apparent recognition of the Board's lack of jurisdiction over those aspects of the complaints, counsel for the complainant, in the particulars which he filed with the Board by letter dated May 18, 1983, and in his oral submissions to the Board in response to Mr. Wahl's motion for dismissal, dwelt upon other matters. The particulars, as set forth in that letter, are as follows:

"1. On or about the third day of March, 1983, the complainant was dealt with by Angelo Fosco, General President of the Labourers' International Union of North America, the respondent herein, contrary to the provisions of Section 3, 68 and 70 of the Labour Relations Act in that he did on his own behalf and on behalf of the respondent union send a letter to D. L. Henri, Secretary-Treasurer of Local 493, of which the complainant was a member at the time, advising the said Mr. Henri that the membership of the complainant in Local Union 493 was under suspension and should be cancelled.

2. On or about the third day of March, 1983, the complainant was dealt with by Arthur E. Coia, Secretary-Treasurer of the Labourers' International Union of North America contrary to the provisions of Sections 3, 68 and 70 of the Labour Relations Act in that he did on his own behalf and on behalf of the respondent union cancel the membership of the complainant in Local Union 493.

3. On or about the 14th day of March, 1983, the complainant was dealt with by Michael Ross, business manager of Local Union 493 contrary to the provisions of Sections 3, 68 and 70 of the Labour Relations Act in that he did on his own behalf and on behalf of the respondent unions cancel the membership of the complainant in Local Union 493.

4. On or about the 10th day of February, 1983, the complainant was dealt with by G. Mullen, Secretary-Treasurer of the Labourers' International Union of North America, Local 527 in Ottawa, Ontario, contrary to the provisions of Sections 3, 68 and 70 of the Labour Relations Act in that he sent a letter to the General President of the Labourers' International Union of North America complaining that the complainant was not eligible for continued membership in Local Union 493.

5. The complainant wishes to refer to the following facts as being part of the background to the complaint relevant to determine whether there has been an alleged violation of the Act.

6. Prior to September, 1982, the complainant performed certain functions as a representative of Local Union 493. On or about the 7th day of July, 1982, the respondent M. A. Ross entered into certain discussions with the complainant concerning his possible employment within one of the various pipeline companies working in the area entrusted to Local 493 at that time.

7. On September 14, 1982, the complainant was initiated into Local Union 493 by the international head office of the Labourers' International Union of North America, located in Washington, District of Columbia, U.S.A. When the complainant applied for membership in Local 493 he met the criteria set down for all members in the past including registration on the Local out-of-work list.

8. At the time that the letter dated March 3, 1983, aforementioned, was directed to D. L. Henri, Secretary-Treasurer of Local 493, from Angelo Fosco, General President, advising that Local that upon a complaint filed with the international office by the respondent, Mr. G. Mullen, that the complainant's membership was being cancelled for lack of payment of taxes to the head office of the Labourers' International Union of North America, the entire membership of Local Union 493 was in fact late in having its per capita tax forwarded to such head office.

9. The complainant states that such per capita taxes as were required to be forwarded to the head office had not been forwarded for reasons entirely out of his control and which he believes involved the administrative difficulties of Local 493. To the best of the complainant's knowledge, he has been the only one whose membership has been cancelled in the manner as aforesaid.

10. The complainant alleges that the individuals and bodies which acted in the manner indicated above acted in a manner which was arbitrary, discriminatory and in bad faith in their representation of the complainant by the trade union or individuals involved. The complainant alleges that the complaints and letters concerning his

status were designed to obtain his wrongful suspension from Local 493 and constituted acts of coercion [sic] designed to cause him to cease to be a member of Local 493 and to continue exercising his rights as such a member.

The complainant seeks to have the cancellation of his membership in Local Union 493 rescinded and wishes to be reinstated with full rights of membership. The complainant further seeks full compensation for lost wages, salaries or any other income resulting from the cancellation of his membership."

4. The aforementioned letter dated March 13, 1983 from Mr. Fosco to Mr. Henri reads as follows:

"Re: K. Sutherland, #2535821,  
Local Union 493, Sudbury, Ont.

Dear Sir and Brother:

Please be advised that both General Secretary-Treasurer Coia and I received a letter dated February 10, 1983, from G. Mullen, complaining that the above-mentioned individual was initiated in Local Union 493, notwithstanding the fact that it was contrary to the provisions of Article III, Section 1(a) of the Uniform Local Union Constitution. Our records reflect that he was initiated September 14, 1982, and per capita tax was last offered in his behalf by your Local Union for November, 1982; and that he now stands suspended as December per capita tax should have been offered by your Local Union prior to February 25, 1983.

I call to your attention Article III, Section 1(a) of the Uniform Local Union Constitution:

'In order to be eligible for membership a person must be working at the calling within the territory of the Local Union in which the individual applies for membership.'

Based on the circumstances, I have requested General Secretary-Treasurer Coia to cancel his membership in Local Union 493; and that all monies forwarded to the Headquarters in Mr. Sutherland's behalf be credited to your account. Local Union 493 is to refund to Mr. Sutherland the amounts he tendered to the Local Union as initiation fees and dues."

Mr. Ross, in his capacity of Business Manager of Local 493, responded to that letter in the following letter dated March 14, 1983, a copy of which was forwarded to the complainant, along with a copy of Mr. Fosco's letter:

"I have this date received your letter dated March 3, 1983 concerning the above mentioned Brother.



Please be advised that we are forwarding a copy of this communication as well as yours, to Keith Sutherland, which is self explanatory to him. We are also enclosing a cheque in the name of K. Sutherland reimbursing him for full initiation fees and dues as per your instructions."

5. Mr. Kopyto contends that the cancellation of the complainant's membership in Local 493, and the actions of the various respondents that led up to that cancellation, contravened sections 3, 68, and 70 of the *Labour Relations Act*. Mr. Wahl, on the other hand, submits that the complaints, as particularized, do not make out a *prima facie* case since section 3 does not create an offence under the Act, the complainant is not within the ambit of section 68, and the complaints do not allege any facts that could be found to constitute "intimidation" or "coercion".

6. Section 3 of the Act provides:

"Every person is free to join a trade union of his own choice and to participate in its lawful activities."

The freedoms enshrined in section 3 are fundamental to the attainment of the object (set forth in the preamble of the Act) of "encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees". Section 3 does not itself create a substantive offence or unfair labour practice capable of being remedied under section 89 of the Act (see, for example, *Frank Manoni*, [1981] OLRB Rep. Dec. 1775, at paragraph 19; *Woodall Construction Company Limited*, [1979] OLRB Rep. June 597, at paragraph 6; *Winson Construction Limited*, [1976] OLRB Rep. Nov. 714, at paragraph 11; and *Deborah Brown*, [1976] OLRB Rep. Feb. 4, at paragraph 12). Nevertheless, the section 3 freedoms are protected from violative conduct through sanctions set out in other sections of the Act, such as sections 64, 66, and 70 (see *The St. Catharines General Hospital*, [1982] OLRB Rep. Mar. 441, at paragraphs 34 - 38, and the authorities referred to in that decision). Section 3 (which finds its U.S. counterpart in section 7 of The National Labour Relations Act) was enacted against the background of common law doctrines, such as criminal and civil conspiracy, which dealt severely with attempts by workers to join together with a view to obtaining improvements in wages and working conditions through collective action (see, for example, Fleming, *The Law of Torts* (5th ed. Melbourne: The Law Book Company Limited, 1977) at 689-694; Forkosch, *A Treatise on Labor Law* (2nd ed. New York: The Bobbs-Merrill Company, Inc., 1965) at 312-320; *Labour Relations Law* (2nd ed. Kingston: Industrial Relations Centre, Queens University, 1974) at 11-17, and 364-366; and Adell, *The Legal Status of Collective Agreements* (Kingston Industrial Relations Centre, Queen's University, 1970) at 6.) Section 3, together with other legislative enactments such as the *Rights of Labour Act*, R.S.O. 1980, c. 456, has removed the taint of unlawfulness which used to accompany trade union membership and various trade union activities. Moreover, as indicated above, the provisions of section 3, in conjunction with unfair labour practice provisions such as sections 64, 66, and 70, have created a substantive protection for legitimate activities of trade unions, although these statutory protections are not unlimited (see, for example, *The Adams Mine, Cliffs of Canada Ltd. Manager*, [1982] OLRB Rep. Dec. 1767, and *St. Catharines General Hospital*, *supra*, at paragraphs 39 and 40). However, section 3 does not require a trade union, such as Local 493 or the International, to admit as a member every person who applies for membership,

or to retain as a member every person who has been admitted into membership. Section 46(2) of the Act implicitly recognizes the power of a trade union to deny or withhold membership, and to expel or suspend members. That provision does not make such actions unlawful; it merely precludes a trade union from requiring an employer to discharge an employee because "he has been expelled or suspended from membership in the trade union", or because "membership in the trade union has been denied to or withheld from the employee", for one of the five reasons specified in clauses (c) – (g) of that subsection. Thus, it is clear from a reading of the Act as a whole that section 3 does not prevent Local 493 or the International from denying the complainant membership or "cancelling" his membership.

7. The complainant's case is also not assisted by section 68 of the Act. That section provides:

"A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be."

Although it is alleged (and must be taken as having been duly established for purposes of this motion) that the complainant has "performed certain functions as a representative of Local Union 493", and that in July of 1982 "the respondent M. A. Ross entered into certain discussions with the complainant concerning his possible employment within one of the various pipeline companies working in the area entrusted to Local 493 at that time", it is not alleged that the complainant is now, or has ever been, an employee "in a bargaining unit" for which Local 493 or the International has bargaining rights. Thus, the complainant cannot rely upon section 68 in regard to the impugned actions of the respondents since the complainant does not fall within the ambit of section 68 which, by its express terms, applies only to representation of employees in a bargaining unit. See *Frank Manoni, supra*, in which the Board wrote as follows at paragraphs 10 and 11 (in a decision concerning a motion, similar to the present one, to dismiss a complaint pursuant to section 71 of the Board's Rules of Procedure):

"The first problem facing the complainants [in regard to section 68] is that neither of them are employees *in a bargaining unit*. This is more than a technicality. The section is an outgrowth of what certain American cases, such as *Vaca v. Sipes* (1967), 386 U.S. 171, described as 'the duty of fair representation', and is concerned with the representation of employees *with their employer*.

11. This precise point was dealt with by the Board in *Arthur Joseph Roberts v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 48*, [1974] OLRB Rep. Mar. 169, in which the complainant, an elected business agent of the Local, complained that he was arbitrarily removed from office. The Board stated, at paragraph 8:

... the duty of fair representation owed by a trade union to an employee under section 60 (now section 68) of the Act does not contemplate controlling the manner in which a trade union conducts its affairs with its elected officials whether they be on the payroll or not. The case law indicates that the propriety of a trade union's behaviour vis a vis its members is governed by its constitution and by-laws and the procedural remedies provided therein. And recourse must be made by an aggrieved member of the governing rules provided under the constitution for relief. The safeguards provided by the controlling supervision of the courts are his assurance that these rules will be implemented fairly and impartially. (See *White v Kuzych* (1951), A.C. 585; *Lee v Showmans Guild* (1952), All. E.R. 1175; *Orchard v Tunney* (1957), S.C.R. 436; 8 D.L.R. 273; *Jurak et al v Cunningham* (No. 1) (1959), 20 D.L.R. (2d) 377; *Jurak et al v Cunningham* (No. 2) (1959), 20 D.L.R. (2d) 381; *Gee v Freeman et al* (1958), 26 W.W.R. 546).

The Board went on to hold, at paragraph 20, that 'under section 60 a trade union's duty of fair representation does not extend to members in good standing who are not employees in a bargaining unit'. To a similar effect, see *Gale Douglas Devereaux*, [1975] OLRB Rep. Nov. 885, at paragraph 9. It should be added that even if brought by persons currently employed in a bargaining unit (and the complainants claim to 'represent' a number of such persons), the present complaint still would be misconceived under section 68. The arbitrary, discriminatory or bad faith conduct directed at such employees and regulated by the section must be such as to produce actual, and not merely speculative prejudice to those employees *at the hands of their employer*.

Those observations, including the final sentence, are also directly applicable to the instant complaints. (See also *United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46*, [1980] OLRB Rep. May 808; *Bricklayers, Masons Independent Union of Canada, Local 1*, [1979] OLRB Rep. Apr. 278; and *Lawrence Aluminum Incorporated*, [1975] OLRB Rep. Nov. 885.)

8. For the foregoing reasons, the Board finds that the complaints as filed do not fall within the purview of section 68 of the Act.

9. It remains for the Board to determine whether the consolidated complaints make out a *prima facie* case for any relief on the basis of the complainant's allegations that the respondents have contravened section 70 of the Act. That section provides:

"No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from

exercising other rights under this Act or from performing any obligations under this Act."

As indicated above, section 70 is one of the unfair labour practice provisions which protect from violative conduct the freedoms enshrined in section 3 of the Act. However, section 70 only applies to situations which involve compulsion, by "intimidation or coercion".

10. The *Shorter Oxford English Dictionary* (Oxford: Oxford University Press, 1978) defines intimidation as "the use of threats or violence to force or restrain from some action", and defines "coercion" as "the action of coercing; constraint, restraint, compulsion". Its definition of "coerce" is "to constrain or restrain by force, or by authority resting on force". The *Random House Dictionary of English Usage* (New York: Random House, 1969) defines "coerce" as follows:

"1. to compel by force, intimidation, etc., especially without regard for individual desire or volition ....

2. to bring about by using force or other forms of compulsion

3. to dominate or control, especially by exploiting fear, anxiety, etc."

11. Common law cases concerning the tort of intimidation also shed some light on the meaning of that term. For example, in *Stratford v. Lindley*, [1964] 2 All E.R. 209 (C.A.), Lord Denning, M.R., wrote as follows (at pages 215-216):

"[The tort of intimidation] has long been known in cases of threats of violence. If one man says to another, 'I will hit you unless you give me £5', or 'unless you give the cook notice', or 'unless you stop dealing with your butcher', and the party so threatened submits to the threat by paying over the £5, or by giving notice to the cook, or by ceasing to deal with the butcher, then the party damnified by the threat - the payer of the £5, or the cook or the butcher, as the case may be - has a cause of action for intimidation against the person who made the threat... [One of the elements] that is essential to the cause of action is that the threat should be a coercive threat. It must be coupled with a demand. It must be intended to coerce a person into doing something that he is unwilling to do or not doing something that he wishes to do. It must be capable of being expressed in the form, 'I will hit you *unless* you do what I ask', or 'if you do what I forbid you to do'. A bare threat without a demand does not, to my mind, amount to the tort of intimidation. If a man says to another, 'I am going to hit you when I get you alone', it is undoubtedly a threat; and an injunction can be obtained to restrain him from carrying out his threat. But the threat itself does not give rise to a claim for damages. It is only when he delivers the blow that it is actionable; and then as an assault, not as intimidation. Very recently it has become clear that the tort of intimidation exists not only in threats of violence, but also in threats to commit a tort or a breach of



contract. The essential ingredients are the same throughout; there must be a coercive threat to use unlawful means, so as to compel a person into doing something that he is unwilling to do, or not doing something that he wishes to do; and the party so threatened must comply with the demand rather than risk the threat being carried into execution. In such case, the party damnified by the compliance can sue for damages for intimidation.”

See also *Clerk & Lindsell on Torts* (15th ed. London: Sweet & Maxwell, 1982) at pages 729-730:

“A commits [the tort of intimidation] if he delivers a threat to B that he will commit an act or use means unlawful as against B, as a result of which B does or refrains from doing some act which he is entitled to do, thereby causing damage to himself or to C ....

The word ‘threat’, together with other words such as ‘coercion’ or even ‘intimidation’, has often been applied to utterances which are quite lawful and give rise to no liability. A threat, for our purposes, is something which puts pressure, perhaps extreme pressure, on the person to whom it is addressed to take a particular course, something by means of which that person is ‘improperly coerced’. A threat is an ‘intimation by one to another that unless the latter does or does not do something the former will do something which the latter will not like’. The threat must be coercive, it must be of the ‘or else’ kind. Furthermore, the concept is not limited to express threats; for there may be acts from which a threat can be *implied*, e.g. a strike engaged upon without previous negotiation with an employer, where the implication is clear that unless the employer does certain things the strike will be continued.”

12. Those passages are not, of course, applicable in their totality to section 70, which makes it an unfair labour practice to *seek* by intimidation or coercion to compel any person to do or refrain from doing any of the things specified in that section. Thus, the provision outlaws any resort to intimidation or coercion for such purpose, and does not require that such purpose be in fact accomplished for section 70 to apply. See, for example, *Saverio A. Greco*, [1976] OLRB Rep. June 323, in which the Board stated:

“32. It is clear from a reading of section 61 [now section 70] that a violation of that section occurs the moment a person ‘seeks’ to compel another to do one of the acts set out in the section. It is therefore unnecessary for a complainant to prove that he has in fact been intimidated or coerced in doing or refraining from doing anything. The offence is complete once an attempt to compel by intimidation or coercion has been made.”

Nevertheless, at a more general level, the passages quoted above concerning the tort of intimidation are useful in emphasizing that for intimidation or coercion to be established, there must be a threat or other intimidating or coercive action coupled with an express or

implied demand that a person (for example) refrain from exercising a right under the Act or from performing an obligation under the Act. Thus, as stated by Paterson J. in *Hodges v. Webb*, [1920] 2 Ch. 71, at page 86, “‘coercion’ involves something in the nature of a negation of choice”. (See also *Central Canada Potash Co. Ltd. v. Government of Saskatchewan* (1978), 88 D.L.R. (3d) 609, at 635-636 (S.C.C.); and *Gershman v. Manitoba Vegetable Producers’ Marketing Board* (1976), 69 D.L.R. (3d) 114, at 120 (Man. C.A.)).

12. Having considered the submissions of the parties, we are of the view that Mr. Sutherland’s complaints, as particularized by counsel, do not make out a *prima facie* case for any relief on the basis of a contravention of section 70. It is not alleged that any of the respondents attempted to use a threat to cancel the complainant’s membership in the International or Local 493 as a means to compel him to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers’ organization or to refrain from exercising any right under the Act or from performing any obligation under the Act. Indeed, it is not alleged that any such threat was ever made for any purpose; the factual allegations indicate that the complainant did not even become aware of the impugned membership cancellation until after it had been effectuated. Thus, the present case is clearly distinguishable from the *Manoni* case *supra*, in which the Board expressed a willingness to receive evidence in support of allegations that, through threats of physical violence, certain union officials “engaged in a pattern of intimidating and coercive conduct designed to frustrate the mechanisms for free and open elections under the union constitution”. By way of contrast, there is no suggestion in the present case of any threats of physical violence or of any other threats. The complainant does not allege that the respondents threatened to cancel his union membership unless he refrained from exercising any right or from performing any obligation under the Act; to the contrary, the essence of the present complaints is that the respondents, without any advance contact with the complainant, wrongfully cancelled his union membership, thereby depriving him of the benefits of such membership. Thus, there is no allegation of any actual or attempted compulsion, domination, or control of the complainant by force or other form of compulsion, the use or attempted use of which is the subject matter of the prohibition set forth in section 70. Thus, the complainant has not made out a *prima facie* case for any relief on the basis of a contravention of section 70 of the Act.

13. Although we have concluded that this complaint should be dismissed because the complainant has not made out a *prima facie* case for any relief under the Act, this decision should not be read as indicating any approbation by the Board of the respondents’ alleged actions. Our dismissal of these complaints merely reflects the fact that the Board has only such jurisdiction as has been conferred upon it by statute. As noted by the Board in *Ontario Hydro*, [1980] OLRB Rep. July 1039, at paragraph 15, “this Board has no specific authority under the Act to undertake any sort of watch-dog role over a union’s internal processes under its constitution and by-laws”. Since the present complaints pertain to internal trade union processes which, on the basis of the complainant’s allegations as particularized by counsel, do not fall within the scope of our jurisdiction, any relief which may be available to the complainant must be obtained in another forum, such as the Courts, or through resort to the avenues of appeal provided by the Constitution of the International.

14. For the foregoing reasons, these complaints are hereby dismissed.

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**1803-82-R** Ontario Public Service Employees Union, Applicant, v. **The Board of Education for the City of Toronto**, Respondent, v. The Federation of Women Teachers Associations of Ontario, Intervener #1, v. Ontario Secondary School Teachers' Federation District 15, Intervener #2, v. Canadian Union of Public Employees, Intervener #3, v. Ontario Public School Teachers' Federation, Intervener #4, v. Group of Employees, Objectors

Representation Vote - Wrong street number indicated in notice designating place of vote - Objectors not prevented from voting because of Board's clerical error - No direct evidence of any employee being deprived of opportunity to vote - Prior agreement on voters' list with ballots of others to be segregated - Segregation of ballots not reason to set aside vote - No evidence of breach of silent period - Vote results upheld and applicant certified

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Member S. Cooke.

*APPEARANCES:* Chris G. Paliare and Barbara Linds for the applicant; Craig Slater and Susan Cook for the respondent; no one appearing for the interveners; Elsa Dunn, Donna M. Aberle, Elaine Lichtenberg, Helen Lumb and Jane Leduc for the objectors.

**DECISION OF THE R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER S. COOKE;** July 22, 1983

1. In a decision dated February 14, 1983 ([1983] OLRB Rep. Feb. 273) in this application for certification, another panel of the Board chaired by the present Vice-Chairman found the following to constitute units of employees of the respondent appropriate for collective bargaining:

all occasional teachers employed by the respondent in its elementary panel in the City of Toronto, save and except persons covered by subsisting collective agreements ("bargaining unit #1");

all occasional teachers employed by the respondent in its secondary panel in the City of Toronto, save and except persons covered by subsisting collective agreements ("bargaining unit #2").

In that unanimous decision, the Board also decided that its usual "thirty day rule" should be applied to determine the number of employees in the bargaining units at the time the application was made, and directed the respondent to file (amended) employee lists containing the information necessary for the application of that rule. Thereafter, the Board appointed Labour Relations Officer V. Robeson to confer with the parties with respect to the amended lists of employees filed by the respondent and to report to the Board thereon.

2. Following meetings on April 6, 13, 27, May 4, and May 17, Ms. Robeson reported to the Board the results of the record checks that she had performed in respect of the applicant's 321 challenges to the amended lists. She also reported that at the May 17, 1983 meeting, representatives of the applicant, the respondent, and the objectors agreed that the continuation of hearing scheduled for May 27, 1983 in this matter would not be necessary, and consented to the Board issuing a decision without a hearing.



3. In a decision dated May 25, 1983, the aforementioned panel of the Board directed that a representation vote be taken of the employees of the respondent in bargaining unit #1, and certified the applicant in respect of bargaining unit #2. Pursuant to that direction, a representation vote was taken on June 9, 1983 in which 87 ballots were marked in favour of the applicant, 54 ballots were marked against the applicant, and 19 ballots were segregated and not counted. (There was also one spoiled ballot.)

4. Following the taking of that representation vote, seven persons filed statements of desire to make representations relating to the vote, in accordance with section 70(1) of the Board's Rules of Procedure. Accordingly, a hearing was held on July 13, 1983 by the present panel of the Board for the purpose of hearing the evidence and submissions of the parties with respect to the representation vote and all other matters arising out of and incidental to this application.

5. At that hearing, the four objectors who testified before the Board raised a number of concerns about the representation vote. Central to their objections was the fact that, through a clerical error, the "place" of the vote indicated on the Board's (Form 69) Notice of Taking of Vote was "Room 104, Faculty of Education, University of Toronto, 317 Bloor Street West, TORONTO, Ontario", whereas the actual street address at which the vote was taken was 371 Bloor Street West. The Board and its staff sincerely regret any inconvenience which may have been occasioned by that clerical error. However, after carefully considering the objectors' evidence and representations concerning that matter, the Board is not persuaded that the inversion of those two numbers in the address has created a situation in which it is necessary or appropriate for the Board to set aside the representation vote and direct that another vote be taken. None of the four witnesses who testified before us was prevented or dissuaded from voting by that clerical error. One of them "had no difficulty voting" because she had attended courses at the Faculty of Education. She testified that two persons called her after the vote to complain about the address being incorrect. However, those persons did not testify before the Board and we are not prepared to give any weight to that hearsay evidence in the circumstances of this case, as to do so would be to deprive the applicant of any opportunity to test the validity of that evidence through cross-examination. Another of the witnesses went to 317 Bloor Street West and was directed to the proper address after inquiring about the vote at that location. The third witness was the objectors' scrutineer at the vote. She had no difficulty locating the polling place because she "phoned the Faculty of Education before the vote to find out exactly where it was". The final witness also had no difficulty locating the polling place because she too had taken courses there. Thus, there is no cogent evidence that the inverted numbers in the street address prevented anyone from voting at the polling place, which was open from 8:00 a.m. to 8:00 p.m. on the day of the vote. As noted by counsel for the applicant, the bargaining unit consists of intelligent, highly educated individuals who would certainly have the wherewithal to ascertain the correct location by telephoning the Board, the applicant or the respondent, or by making inquiries at the address indicated on the Notice. Moreover, it is reasonable to infer that a number of the persons in the bargaining unit would be familiar with the location of the vote as a result of having taken courses at the "Faculty of Education", as had two of the four witnesses who testified before us.

6. The objectors also contended that the voters' list did not include the name of every person who teaches in the respondent's elementary panel as an occasional teacher. After devoting substantial time and effort to resolving the numerous challenges to the



employer's (amended) list of employees in the bargaining unit on the date of the application, and with a view to facilitating the taking of a vote before the end of the 1982-83 academic year, the parties, including a representative of the objectors, agreed on May 17, 1983 that the revised employer's list which had emerged from that process would be used as the voters' list, on the understanding that any other occasional teachers who wished to vote would be permitted to cast segregated ballots, with their eligibility to vote being determined at a later date, if necessary. Accordingly, the Board's vote direction, as set forth in the aforementioned decision dated May 25, 1983 and in the (Form 69) Notice of Taking of Vote, indicated that all occasional teachers employed by the respondent in its elementary panel in the City of Toronto on May 17, 1983, (the date of the voters' list) would be eligible to vote, with the exception of any such teachers who voluntarily terminated their employment or were discharged for cause between May 17, 1983 and the date the vote was taken. That Notice was posted at each of the respondent's elementary schools (and was also mailed to each person on the voters' list). One of the objectors testified that some persons were offended by the fact that their votes were segregated. The Board has a longstanding practice of segregating ballots cast by persons whose eligibility to vote is disputed by a party. Each person is instructed (by Board's Returning Officer) to place his or her ballot inside a white envelope (on which is printed "SECRET BALLOT") and to seal the white envelope. The sealed white envelope is then placed inside a brown envelope. The brown envelope is then sealed and the name of the person whose secret ballot it contains is written on the outside of the brown envelope so that the secret ballot can be distinguished from other secret ballots by the Returning Officer. Those segregated ballots remain in the custody of the Returning Officer and the Board. Where the Board rules that some or all of the segregated ballots are to be counted, the Returning Officer removes (from the brown envelopes) the white envelopes containing the ballots which are to be counted and discards the brown envelopes. The Returning Officer then opens the white envelopes, removes the ballots, mixes them and counts them in a manner which maintains the secrecy of all such ballots. In the event that a segregated ballot is not counted, it is destroyed by the Board. There is no evidence that there was any material departure from that usual practice in the present case. The use of segregated ballots is virtually inevitable in a bargaining unit of this size and scope, and would in all probability have been more extensive in the present case but for the aforementioned agreement concerning the voters' list. Thus, the segregation of 19 of the 161 ballots cast in the representation vote does not constitute a legitimate basis for setting aside that vote.

7. The objectors also expressed dissatisfaction with the application of the Board's "thirty day rule" in the circumstances of this case. However, as indicated above, that rule was found to be applicable for the detailed reasons set forth in the (February 14, 1983) unanimous decision issued by the aforementioned panel of the Board after hearing and considering the submissions of the parties, including the submissions of counsel for one of the objectors who attended at that hearing. Moreover, the application of that rule did not preclude other persons who felt that they should be entitled to cast a ballot in the representation vote, from doing so.

8. Some of the objectors also alleged that the applicant had contravened the Registrar's direction that all interested persons "refrain and desist from propaganda and electioneering" from midnight of Sunday, June 5, 1983, until the taking of the vote. However, there was no cogent evidence adduced before the Board in support of those allegations.

9. Having carefully considered all of the evidence and the submissions of the parties, the Board is satisfied that none of the matters of which the objectors complain would prevent the true wishes of the employees in the bargaining unit from being freely indicated in the representation vote. Accordingly, the Board, in the exercise of its discretion under 103(5) of the Act, declines to direct that a further representation vote be taken.

10. As indicated above, on the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast were cast in favour of the applicant. (Since the segregated ballots would not affect that result even if all of them were marked against the applicant, it is unnecessary to determine whether or not the persons who cast segregated ballots were eligible to vote.)

11. A certificate will issue to the applicant in respect of bargaining unit #1.

12. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of thirty days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such thirty day period.

#### **DECISION OF BOARD MEMBER W. H. WIGHTMAN;**

1. I associate myself with the majority of the panel with respect to the comments intended to allay concerns over the practice of segregating disputed ballots and the assurance of confidentiality which the Board practice assures. Nor can I disagree with the conclusion to apply the "30-30" rule in this rather unusual case. An alternative might have been to apply the construction industry rule which makes eligible only those persons at work on a specific date determined by the Board and I presume this would have been even less satisfactory or understandable to the objectors.

2. However, the uniqueness of the situation, particularly in terms of the difficulties which the various interested parties apart from the respondent employer would have in establishing contact with the affected employees, leads me to feel that in ordering a vote it is incumbent upon us to make every possible effort to ensure that persons eligible to vote are indeed aware of their eligibility, aware of the time and place of voting and able to inform themselves or be informed of the views of the various parties.

3. In these circumstances any irregularity, including the improper address of the voting location on Form 69, takes on heightened importance in my view.

4. While there is some arguable question as to the actual size of the proper voting constituency, it is clear that by any reasonable measurement these "occasional teachers" would number in the hundreds and that the total ballots cast represented a fraction of the constituency which would be too small in my view to have given confidence that the voting result was a fair indication of the wishes of the majority. I am reinforced in this belief through evidence that the applicant had a clear advantage over the objectors and other interveners in making contact with eligible voters.

5. I would have ordered a new vote with the expectation that a larger turnout of voters would have yielded a more credible result.

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**0120-83-R United Steelworkers of America, Applicant, v. Service Employees International Union and Service Employees Union, Local 204, Respondents, v. Employee, Objector**

**Certification - Employee Trade Union - Trade Union Status - Applicant seeking certification for employees of respondent union - Respondent union objecting to inclusion of field staff - Fact that applicant union employing persons not triggering s.13 bar to certification - Applicant's constitution not preventing members joining other unions - Board finding no conflict where field staff of one union organized by another union**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and P. J. O'Keefe.

*APPEARANCES: James Hayes and Alex Muselius for the applicant; Stewart D. Saxe and Ron Davidson for the respondents; no one for the objector.*

**DECISION OF THE BOARD;** July 20, 1983

1. This is an application for certification.
2. The Board finds the applicant to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The respondent is, of course, itself a trade union, and as an employer before the Board in this case, raised two preliminary issues for the Board to consider prior to proceeding with this application. The application concerns both the office and field staff of the respondent local union, the applicant seeking to combine them in one bargaining unit appropriate for collective bargaining, and the respondent arguing that, if anything, separate units of the two groups of employees would be appropriate. But apart from this, the respondent argues that the application ought to be dismissed, at least insofar as it relates to its field staff, on the following grounds:
  1. That the fact that the applicant is an "employer" raises in the particular circumstances of *this* case a section 13 bar;
  2. that the applicant is precluded by its own constitution from admitting the respondent's field staff as members.
4. Section 13 of the *Labour Relations Act* reads:
 

The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.
5. The respondent readily concedes that every trade union must engage "employees" to carry on its functions and that some limitation must obviously be put on the meaning of the word "employer" in section 13. But he argues that the prohibition *does* apply in this case to those employees who are engaged in the "core" function of the



respective trade unions, i.e., the organizing of employees into membership. The respondent argues that since there is, in theory at least, an admitted overlap in jurisdiction between the Service Employees International Union and the United Steelworkers of America, there is potentially a real conflict of interest in persons employed to function as staff representatives in their capacity of employees of the respondent, with their capacity as members of the Steelworkers Union. Counsel relies on the following passage from the Board's decision in *Canada Crushed Stone Ltd.*, [1977] OLRB Rep. Dec. 806, in support of his argument that the concern under section 13 is not limited to influence or support by the employer of the very employees being organized. The Board in that decision stated:

27. Section [13] of the Act bars the certification of a trade union which has accepted the support of "*any employer*". The broad purpose of the section, simply stated, is to preserve the integrity of the collective bargaining process by barring the application of any trade union which, because of employer support, does not owe its sole allegiance to those whom it seeks to represent. A trade union which has accepted the support of any employer whose interests may be affected by its representation places itself in a potential conflict of interest and thereby undermines itself as a union "qualified" to act on behalf of those it seeks to represent. Section [13] catches both the "sweetheart" arrangement between the parties directly affected and also the accepted support of any outside employer whose interests may be affected by the collective representation of those whom the union seeks to represent. In both instances the union's acceptance of employer support activates the section [13] bar.

6. But in that case the Board was dealing with a situation where certain of the drivers in the proposed bargaining unit were found to be the actual employers of other drivers included within the unit. The Board's concern, therefore, as stated at paragraph 22 of the decision, was that the applicant was seeking to organize these "employers" in the very bargaining unit which contained the persons they employed. In fact, the "employers" were the same persons whom the Board found to have been spearheading the organizing drive. This brought the case much closer to the classic kind of conflict seen in *The Dr. George A. Morgan United Auto Workers Dental Centre*, [1977] OLRB Rep. Jan. 1, where the International Union was seeking to organize the employees of one of its own locals. The "conflict" in the present case, by contrast, relates only to a possible jurisdictional one sometime in the future, where, according to the respondent, employees will be placed in the position of not knowing whether they owed their allegiance to the employer (the respondent) or their trade union. While such a jurisdictional conflict is admittedly a possibility, it is not an obvious one based on current practice. To the extent that it *may* arise, there are ways of dealing with it: for example, the applicant has filed one of its collective agreements wherein it represents the staff representatives of the Manitoba Food and Commercial Workers Union, Local 832, in the Province of Manitoba, and that collective agreement deals with the issue in the following article pertaining to "loyalty":

#### SECTION 8 LOYALTY

It is agreed that in the event of conflict of interest between the Manitoba Food & Commercial Workers and the United Steelworkers



of America regarding jurisdiction or other matters of a similar nature, the Representatives' loyalty shall be with the Manitoba Food & Commercial Workers.

If, beyond this, a staff representative of the respondent were to become improperly confused at a material point down the road as to whom he owed his allegiance in carrying out his job functions, the respondent presumably would have ample means of dealing with the matter on a normal employer-employee basis.

7. The respondent argues further on this point, again distinguishing its field staff from the office and clerical workers, that there are a very limited number of potential employers for persons of the staff organizers' skills, and that the present applicant is a major one of those. The respondent points to the fact that indeed two of its present staff organizers have come to it by way of the applicant union itself. The respondent argues from this that when a major employer such as the applicant approaches one of its field staff representatives and asks him to sign a membership card, the employee may feel fettered in his ability to make up his own mind and say "no". The reason for this difficulty, the respondent argues, is that in the back of the employee's mind, he may feel that he may some day have to approach this same applicant trade union for employment.

8. Once again, the Board finds this scenario too remote to cause it to be given any weight in the present application. While the list of collective agreements filed by the respondent does show a clear preponderance of having "professional" staff workers of a trade union organized by an "independent" association, the Board can see no reason to find this not to continue to be a matter of the employees' choice.

9. Alternatively, for the same reasons, the respondent argues that the Board ought in this particular case to define the question of "appropriateness" of a bargaining unit in terms of who is the applicant, and find that the sought-for bargaining unit for *this* applicant is inappropriate. The Board, however, has not in the past dealt with the question of appropriateness in these terms, and, also for the same reasons given above, does not consider this to be an appropriate case to start.

10. Finally, the respondent's argument on the applicant's constitution is that it precludes the respondent's staff representatives from becoming members, and that the Board, subject to satisfactory evidence of practice under section 103(4) of the Act ought to refuse to certify the applicant on the authority of such cases as *Gaymer & Oultram*, 54 CLLC ¶17,073. But the applicant's constitution does not contain such a prohibition. What it does contain is a list of offences for which a member may, at some future point, be declared to be no longer a member in good standing. Those offences include, in Article XII:

• • •

(f) working in the interest of or accepting membership in any organization dual to the International Union.

But as far as *joining* the union at this point, there are no relevant restrictions whatever under the "eligibility requirements" of Article III of the constitution, which embraces "all working men and working women in the United States and Canada ...". The only time

that the staff representatives of the SEIU would have a problem is if the Executive of the USWA decided that the SEIU was an organization "dual" to the USWA, within the intended meaning of the latter's constitution. That, based on the present preponderance of the two unions' jurisdictions, seems unlikely, particularly when it would have the effect of eliminating the employees of the very bargaining unit whom the Steelworkers seek to represent. It is obvious that the applicant and the employees do not feel uncomfortable with the situation as it presently exists, and the respondent trade union, as employer, need not be quite so solicitous of their interests. If a problem should in fact materialize under the constitution in the future, the employees making up this bargaining unit would have available for them the appropriate procedures under the *Labour Relations Act* for resolving it.

11. The parties met with a Labour Relations Officer on May 24, 1983, in order to identify the bargaining-unit issues in dispute. Having regard to the report of the Officer, the Board appoints an officer to inquire into and report to the Board on:

- (a) the community of interest between the respondent's field staff and its office staff;
- (b) in light of the unresolved question of one bargaining unit or two, the practice by the respondent of using part-time employees or students with respect to either office or field staff;
- (c) the duties and responsibilities of Joseph Aggimenti, Eugene R. Laliberte, Barbara Spooner and A. J. Edge; and
- (d) in light of the unresolved question of one bargaining unit or two, the community of interest of Joyce Hansen, Carlo Mastragostino and Joyce Todkill.

The parties should also state to the Officer the specifics of their position with respect to V. Ghose and R. Nahls, so that the Board may ultimately make a determination, should such determination be material.

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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1983

## BARGAINING AGENTS CERTIFIED

### No Vote Conducted

**0019-82-R:** International Ladies Garment Workers' Union, (Applicant) v. Apple Bee Shirts Limited, (Respondent) v. Group of Employees, (Objectors)

Unit: "all employees of the respondent employer in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (106 employees in unit). (*Clarity Note*)

**0273-82-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Bot Construction (Canada) Limited, (Respondent).

Unit: "all employees of the respondent at the Canadian National Railways Quarry at Beardmore, save and except office staff, kitchen employees, foremen and persons above the rank of foremen." (23 employees in unit). (*Having regard to the agreement of the parties*).

**0471-82-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (Applicant/Complainant) v. Wilco-Canada Inc., (Respondent).

Unit: "all employees of the respondent at London, Ontario, save and except foremen, persons above the rank of foremen, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (36 employees in unit). (*Having regard to the agreement of the parties*).

**1204-82-R:** Windsor Newspaper Guild, Local 239, The Newspaper Guild (CLC-AFL-CIO), (Applicant) v. The Windsor Star, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in its Editorial Department at the Windsor Star in the Province of Ontario, save and except Editor, Managing Editor, Assistant Managing Editor, Metro Editor, News Editor, and Secretary to Editor, Sports Editor, Photo Editor, Assistant Metro Editor - District Editor - Editorial Page, Business Editor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (78 employees in unit).

Unit #2: "all employees of the respondent in its Editorial Department at The Windsor Star in the Province of Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except Editor, Managing Editor, Assistant Managing Editor, Metro Editor, News Editor, and Secretary to Editor, Sports Editor, Photo Editor, Assistant Metro Editor - District Editor - Editorial Page and Business Editor." (4 employees in the unit).

**1899-82-R:** Ontario Nurses' Association, (Applicant) v. Children's Hospital of Eastern Ontario, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all registered and graduate nurses engaged in a nursing capacity by the respondent at Ottawa, Ontario, save and except director of staff health, director of educational services, public health and discharge planning nurse, head nurses, persons above the rank of head nurse, and persons regularly employed for not more than 24 hours per week." (57 employees in unit).

Unit #2: "all registered and graduate nurses engaged in nursing capacity by the respondent at Ottawa, Ontario, regularly employed for not more than 24 hours per week, save and except regional neonatal education coordinator, head nurses, and persons above the rank of head nurse." (54 employees in unit).

**1937-82-R:** Local Union 636 of the International Brotherhood of Electrical Workers, (Applicant) v. Clinton Public Utilities Commission, (Respondent).

Unit: "all employees of the respondent at Clinton, Ontario, save and except Manager, persons above the rank of Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (9 employees in unit).

**2253-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. York Condominium Corporation 365 and/or Perscel Management Ltd., (Respondents).

Unit: "all employees of York Condominium Corporation 365 engaged in cleaning and maintenance at 4060, 4062 and 4064 Lawrence Avenue, East, including resident superintendents, save and except property manager and persons above the rank of property manager." (5 employees in unit). (*Having regard to the agreement of the parties*).

**2296-82-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Western Ontario Truck Centre Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of London, Ontario, save and except foremen, persons above the rank of foremen, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (24 employees in unit).

**2322-82-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Fort Frances - Rainy River Board of Education, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

**2682-82-R:** Textile Processors, Service Trades, Health Care Professional and Technical Employees International Union, Local 351, (Applicant) v. The Constellation Hotel Corporation Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except managers, assistant managers, and department heads; persons above the rank of manager and department head; office, administration, sales, accounting and auditing staff; security staff; persons regularly employed for not more than 24 hours per week; students employed during the school vacation period and students enrolled in the hotel management courses including the Constellation Hotel School." (369 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2749-82-R:** Aluminum Brick and Glass Workers International Union, (Applicant) v. Trulite Industries Limited, (Respondent) v. Group of Employees, (Objectors).



Unit: "all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff." (35 employees in unit). (*Having regard to the agreement of the parties*).

**0203-83-R:** Labourers' International Union of North America, Local 527, (Applicant) v. Pierre A. Gratton Const. Inc., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding, the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen." (5 employees in unit).

**0328-83-R:** Ontario Nurses' Association, (Applicant) v. District Municipality of Muskoka, (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at its Home for the Aged (The Pines) in Bracebridge, Ontario, save and except Assistant Director of Nursing, persons above the rank of Assistant Director of Nursing and persons regularly employed for not more than 24 hours per week." (7 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses regularly employed in a nursing capacity by the respondent at its Home for the Aged (The Pines) in Bracebridge, Ontario, for not more than 24 hours per week, save and except Assistant Director of Nursing and persons above the rank of Assistant Director of Nursing." (2 employees in unit). (*Having regard to the agreement of the parties*).

**0343-83-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Centennial Hospital Linen Services Inc., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, regularly employed for not more than 20 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and sales staff and drivers." (92 employees in unit). (*Having regard to the agreement of the parties*).

**0355-83-R:** Service Employees' Union, Local 204, Affiliated with the A.F. of L., C.I.O., C.L.C., (Applicant) v. Toronto East General and Orthopaedic Hospital Inc., (Respondent).

Unit: "all employees of the respondent at its detoxification centre in the Municipality of Metropolitan Toronto, Ontario, save and except supervisors and persons above the rank of supervisor." (7 employees in unit). (*Having regard to the agreement of the parties*).

**0368-83-R:** Local 793, International Union of Operating Engineers, (Applicant) v. Daimerson Construction Company Limited, (Respondent).

Unit #1: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in

the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0382-83-R:** Retail Clerks Union, Local 409, (Applicant) v. VS Services Ltd., (Respondent).

Unit: "all employees of the respondent at its unit at Great Lakes Paper in Thunder Bay, save and except manager and persons above the rank of manager." (8 employees in unit). (*Having regard to the agreement of the parties*).

**0387-83-R:** Sault Ste. Marie Typographical Union, Local 746, (Applicant) v. The Sault Star, a Division of Southam Inc., (Respondents).

Unit: "all employees in the Circulation Department and the Mailing Room of the respondent at Sault Ste. Marie, save and except assistant circulation manager, mail room foreman, persons above the rank of assistant circulation manager and mail room foreman, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (29 employees in unit). (*Having regard to the agreement of the parties*).

**0389-83-R:** Sheet Metal Workers' International Association Local 47, (Applicant) v. Emile Seguin & Fils Ltee., (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen." (3 employees in unit).

**0413-83-R:** United Garment Workers of America, (Applicant) v. Ontario Publications Limited, (Respondent).

Unit: "all employees of the respondent at Guelph, Ontario save and except supervisors and persons above the rank of supervisor." (4 employees in unit). (*Having regard to the agreement of the parties*).

**0417-83-R:** Local Union 636 of The International Brotherhood of Electrical Workers, (Applicant) v. Guardian Security Systems (Kitchener) Limited, (Respondent).

Unit: "all employees of the respondent in Kitchener, Ontario, save and except managers, persons above the rank of manager, sales representatives, office and clerical staff." (21 employees in the unit). (*Having regard to the agreement of the parties*).

**0441-83-R:** International Brotherhood of Painters and Allied Trades - Local Union 1891, (Applicant) v. Loed Contractors, (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foremen." (3 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0451-83-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees, International Union, Local 351, (Applicant) v. London Hospital Linen Service, Incorporated, (Respondent).

Unit: "all employees of the respondent in London, Ontario, regularly employed for not more than 20 hours per week and students employed for the school vacation period, save and except supervisors and persons above the rank of supervisor." (22 employees in unit). (*Having regard to the agreement of the parties*).

**0452-83-R:** Labourers' International Union of North America, Local 183, (Applicant) v. P.M.F. Construction Company, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**0465-83-R:** Local 47 Sheet Metal Workers' International Association, (Applicant) v. J. P. Clark Mechanical Co. Limited, (Respondent).

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foreman, and persons above the rank of non-working foreman." (2 employees in the unit).

**0466-83-R:** Labourers' International Union of North America, Local 506, (Applicant) v. Teperman and Sons Inc., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in unit).

**0482-83-R:** Canadian Union of Public Employees, (Applicant) v. Boys and Girls Club of Ottawa-Carleton, (Respondent).

Unit #1: "all employees of the respondent at Ottawa, save and except unit managers, maintenance

superintendent, persons above the rank of unit manager and maintenance superintendent, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (27 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent at Ottawa regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except unit managers, maintenance superintendent, and persons above the rank of unit manager and maintenance superintendent.” (14 employees in unit). (*Having regard to the agreement of the parties*).

**0502-83-R:** International Union of Allied, Novelty and Production Workers, Local 905, (Applicant) v. Empire Woodworking Co. Ltd., (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than 24 hours per week and students employed for the school vacation period.” (33 employees in unit). (*Having regard to the agreement of the parties*).

**0505-83-R:** Labourers’ International Union of North America, Local 506, (Applicant) v. Global Demolition Ltd., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (12 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen.” (12 employees in unit).

**0509-83-R:** Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Leader Linen Supply Limited, (Respondent).

Unit: “all drivers of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, sales and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (6 employees in the unit). (*Having regard to the agreement of the parties*).

**0526-83-R:** International Molders & Allied Trades Union, (Applicant) v. Clawsey-Sohrt Manufacturing Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at Cambridge, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (20 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0528-83-R:** Service Employees’ Union, Local 210, affiliated with Service Employees’ International Union, AFL-CIO-CLC, (Applicant) v. Windsor Western Hospital Centre Inc., (Respondent) v. Ontario Public Service Employees’ Union, (Intervener).

Unit: “all employees of the respondent at its I.O.D.E. Unit in Windsor, Ontario, regularly employed for not more than 18 1/2 hours per week and students employed during the school



vacation period save and except paramedical employees, supervisors, foremen, persons above the rank of supervisor and foreman, office and clerical staff and persons covered by subsisting collective agreements between the respondent and the Ontario Nurses' Association, Canadian Union of Public Employees, Local 161, Ontario Public Service Employees Union and Canadian Union of Operating Engineers and General Workers." (29 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

## Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

**1591-82-R:** Sterling Employees Association, (Applicant) v. Sterling Marking Products Inc., (Respondent).

Unit: "all employees of the respondent in London, Ontario, save and except supervisors, office and clerical staff, sales staff, janitorial personnel, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (45 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		45
Number of persons who cast ballots	39	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list		27
Number of segregated ballots cast by persons whose names appear on voters' list		12

**2147-82-R:** Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. Foodcorp. Limited, Urban Restaurant Division, Commerce Court, (Respondent).

Unit: "all employees of the respondent's Urban Restaurant Division working at Commerce Court (Wellington's Dining Room & Wellington's on the Court Lounge, Jolly Chef, Teller's Cage, Cafe Galleria, P.J.'s West & P.J.'s East) in the City of Toronto, save and except supervisors, chefs, sous chefs, persons above the rank of supervisor, chef and sous chef, management trainees, entertainers, office, sales, accounting and support staff, and students employed during the school vacation period." (97 employees in unit).

Number of names of persons on list as originally prepared by employer		96
Number of persons who cast ballots	84	
Number of segregated ballots cast by persons whose names appear on voters' list		5
Number of segregated ballots cast by persons who names do not appear on voters' list		1
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		47
Number of ballots marked against applicant		30

**2674-82-R:** Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. V.I.P. Hotels Limited, carrying on business as Sutton Place Hotel, (Respondent).

Unit: "all employees of the respondent in the banquet department at the Sutton Place Hotel, Toronto, Ontario, save and except maitre d', supervisors, and those employees above the rank of supervisor, sales and accounting staff, and those employees covered by an existing collective agreement between the parties." (28 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		24
Number of persons who cast ballots	24	
Number of ballots marked in favour of applicant		19
Number of ballots marked against applicant		5

**0152-83-R:** Hotel Employees and Restaurant Employees Union, Local 75, of the Hotel Employees and Restaurant Employees International Union, A.F.L. - C.I.O. - C.L.C., (Applicant) v. Ramada Renaissance Hotel, (Respondent).

Unit: "all employees of the respondent at 2035 Kennedy Road, Scarborough, Ontario, save and except supervisors, persons above the rank of supervisor, sales and office staff, front desk, security persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (173 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		229
Number of persons who cast ballots	184	
Number of spoiled ballots		4
Number of ballots marked in favour of applicant		106
Number of ballots marked against applicant		71
Ballots segregated and not counted		3

**0194-83-R:** Energy Chemical Workers Union, CLC, (Applicant) v. Lac Minerals Ltd., Milton Limestone Division, (Respondent) v. United Cement, Lime, Gypsum and Allied Workers International Union, AFL-CIO-CLC, (Intervener).

Unit: "all employees of the respondent at its quarry and plant in the Town of Milton, Ontario, save and except foremen, persons above the rank of foreman, dispatchers, office and sales staff, watchmen, and persons covered by a subsisting collective agreement." (23 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		24
Number of persons who cast ballots	24	
Number of ballots marked in favour of applicant		13
Number of ballots marked in favour of intervener		10
Ballots segregated and not counted		1

**0216-83-R:** Canadian Union of Public Employees, (Applicant) v. Domus Building Cleaning Co. Ltd., (Respondent).

Unit: "all employees of the respondent at the Centre de Sante Elizabeth Bruyere in Ottawa, Ontario, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than twenty-four hours per week." (34 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		24
Number of persons who cast ballots	24	
Number of ballots marked in favour of applicant		18
Number of ballots marked against applicant		6

**0224-83-R:** Upholsterers' International Union of North America, (Applicant) v. Bedford Bedding & Upholstery Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foremen, office and sales staff, and students employed

for the school vacation period.” (197 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		197
Number of persons who cast ballots	189	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		121
Number of ballots marked against applicant		47
Ballots segregated and not counted		20

**0366-83-R:** Service Employees Union, Local 204, Affiliated with A.F.L., C.I.O., C.L.C., (Applicant) v. West Park Hospital, (Respondent).

Unit: “all office and clerical employees of the respondent in Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, and one secretary to each of the following: Executive Director, Assistant Executive Director, Director of Nursing, Director of Human Resources, Director of General Services, and Medical Director”. (65 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		60
Number of persons who cast ballots	48	
Number of ballots marked in favour of applicant		40
Number of ballots marked against applicant		8

**0376-83-R:** Bakery, Confectionery & Tobacco Workers International Union, Local 264, (Applicant) v. Farm Lane Foods Inc., (Respondent).

Unit: “all employees of the respondent at the Town of Simcoe, Ontario, save and except foremen and foreladies, those above the rank of foreman and forelady, office staff, quality control and security staff.” (53 employees in unit).

Number of names of persons on list as originally prepared by employer		48
Number of persons who cast ballots	47	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		34
Ballots segregated and not counted		2

## Applications for Certification Dismissed – No Vote Conducted

**2678-82-R:** International Union of Operating Engineers, Local 793, (Applicant) v. T. Ruscica & Sons Inc., (Respondent). (16 employees in unit).

**0448-83-R:** Canadian Union of Operating Engineers and General Workers, (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario operating St. Joseph Hospital at Sarnia, Ontario, (Respondent). (9 employees in unit).

**0449 83-R:** The Canadian Union of Public Employees, (Applicant) v. Covenant House Under 21 Youth Foundation of Metropolitan Toronto, (Respondent). (2 employees in unit).

**0450-83-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Dufferin Construction Company, A Division of St. Lawrence Cement Inc., (Respondent). (37 employees in unit).

**0522-83-R:** Textile Processors, Service Trades, Health Care Professional and Technical Employees International Union, Local 351, (Applicant) v. Windsor Arms Hotel Limited, (Respondent). (45 employees in unit).

### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**0907-82-R; 0908-82-R:** Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Applicant) v. Princess Hotel Kingston Ltd. (carrying on business as the Princess Hotel and the Shamrock Hotel), (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of Princess Hotel Kingston Ltd., at its hotel operations in the municipality of Kingston, Ontario, save and except managers, office and sales staff and audit department." (29 employees in unit).

Number of names of persons on list as originally prepared by employer		42
Number of persons who cast ballots	38	
Number of ballots marked in favour of applicant		16
Number of ballots marked against applicant		17
Ballots segregated and not counted		4

**0163-83-R:** Lumber and Sawmill Workers Union Local 2639, of the United Brotherhood of Carpenters & Joiners of America, (Applicant) v. Hemiwood Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees engaged in the Sawmill, Plant and Yard of the Company's operations at Atikokan, Ontario, save and except foremen, persons above the rank of foreman, scalers, office and sales staff." (33 employees in unit).

Number of names of persons on list as originally prepared by employer		33
Number of persons who cast ballots	26	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		15

**0192-83-R:** United Steelworkers of America, (Applicant) v. Electrolux Canada, a division of Consolidated Foods Corporation of Canada Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at 60 California Avenue, Brockville, save and except foremen, persons above the rank of foreman, office, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (113 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		87
Number of persons who cast ballots	87	
Number of ballots marked in favour of applicant		36
Number of ballots marked against applicant		51

**0291-83-R:** The Canadian Brotherhood of Railway Transport and General Workers, (Applicant) v. Kunkel Services Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at and out of Mildmay, Ontario, who are regularly employed for not more than twenty-four (24) hours per week, save and except mechanics, office and sales staff foremen, and persons above the rank of foreman." (71 employees in unit).



Number of names of persons on revised voters' list		67
Number of persons who cast ballots	47	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		31
Ballots segregated and not counted		5

**0367-83-R:** Labourers' International Union of North America, Local 527, (Applicant) v. Cambridge Leaseholds Limited, (Respondents) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Cornwall Square, 1 Water Street East, Cornwall, Ontario save and except supervisors, managers, persons above the rank of supervisor and manager and clerical staff." (11 employees in unit).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		6

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**2683-82-R:** Textile Processors, Service Trades, Health Care Professional and Technical Employees International Union, Local 351, (Applicant) v. The Constellation Hotel Corporation Ltd., (Respondent).

**0388-83-R:** Hotel and Restaurant Employees Union, Local 75, (Applicant) v. Cara Operations Ltd. carrying on business at the Cara Inn at 6257 Airport Rd., Malton, Ont., (Respondent).

**0394-83-R:** United Paperworkers International Union, Local #548, (Applicant) v. James River Marathon Limited (Formerly) American Can Canada Inc., (Respondent).

**0414-83-R:** Labour College of Canada Teachers' Union, (Applicant) v. Labour College of Canada, (Respondent).

**0418-83-R:** International Brotherhood of Painters and Allied Trade - Local Union 1891, (Applicant) v. Leod Contractors, (Respondent).

**0433-83-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Travelways School Transit Limited, (Respondent).

**0473-83-R:** The Association of Professional Student Services Personnel, (Applicant) V. Board of Education for the Borough of Scarborough, (Respondent).

**0476-83-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. A.W.K. Industrial Coating, (Respondent).

**0490-83-R:** Local 29 Bricklayers Union of the Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, (Applicant) v. Frank Crosato Masonry, (Respondent).

**0512-83-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Del Realty Property Management Division and/or Deltan Realty Ltd. and/or Gaza Investments Limited, (Respondent).

**0513-83-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Perfect Metro Cleaners and/or E. & M. Cleaning Co., (Respondent).

**0524-83-R:** Canadian Union of Public Employees, (Applicant) v. City of Windsor Inside Workers L. 543 Canadian Union of Public Employees, (Respondent).

**0555-83-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Bluebird Construction, a division of 5151112 Ontario Limited, (Respondent).

**0566-83-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Nortenha Carpentry Contractors Ltd., (Respondents).

**0574-83-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Rudolph's Specialty Bakeries Ltd., (Respondent).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**0362-82-R:** Retail Commercial and Industrial Union Local 206 and Commercial Workers Union Local 486 chartered by the United Food & Commercial Workers International Union, (Applicant) v. Canada Safeway Limited, (Respondent). (*Dismissed*).

**0373-83-R:** Local 787 Refrigeration Workers of Ontario of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Cimco, Division of Toromont Industries Ltd. and Toromont Industries Ltd. carrying on business as CIMCO and Climate Control, (Respondents). (*Withdrawn*).

**0383-83-R:** Teamsters Local Union 419, (Applicant) v. Ralston Purina Canada Inc., McPherson Warehousing Co. Ltd., (Respondent). (*Withdrawn*).

**0385-83-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1946, (Applicant) v. The John Hayman & Sons Co. Ltd.; Ontario and King Limited, (Respondents). (*Withdrawn*).

**0556-83-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Bluebird Construction, a division of 5151112 Ontario Limited, Lakeway Equipment & Tool Rental Limited, FDV Construction Ltd., (Respondents). (*Withdrawn*).

## SALE OF A BUSINESS

**0361-82-R:** Retail Commercial & Industrial Union Local 206 and Commercial Workers Union Local 486 chartered by the United Food and Commercial Workers International Union, (Applicant) v. Food Barn, (Respondent). (*Dismissed*).

**1545-82-R:** United Food and Commercial Workers International Union, AFL, CIO, CLC, Region 18 on behalf of its Local 596, (Applicant/Complainant) v. The National Bank, Price Waterhouse Ltd., The Federal Business Development Bank and Touche, Ross Limited, (Respondents). (*Dismissed*).

**1920-82-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. 268121 Ontario

Limited and Hamilton Cargo Transit Limited, and Peat Marwick Limited, (Respondents) v. Labourers' International Union of North America, Local 1267, (Intervener) v. A Group of Employees, (Interveners). (*Granted*).

**0023-83-R:** United Brotherhood of Carpenters and Joiners of America, Local Union No. 446, (Applicant) v. Pitts Engineering Construction, a division of Banister Continental Ltd., Pitts Atlantic Construction Limited, Banister Continental Ltd., (Respondents). (*Granted*).

**0373-83-R:** Local 787 Refrigeration Workers of Ontario of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Cimco, Division of Toromont Industries Ltd. and Toromont Industries Ltd. carrying on business as Cimco and Climate Control, (Respondents). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**2709-82-R:** Robert Calder, (Applicant) v. Canadian Union of Public Employees, (Respondent) v. The Corporation of the Town of Collingwood, (Intervener).

Unit: "all employees of The Corporation of the Town of Collingwood, save and except office and clerical staff, foremen, supervisors, persons above the rank of foreman and supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (4 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	0
Number of ballots marked in favour of respondent		4
Number of ballots marked against respondent		

**2758-82-R:** John Donald Clark, (Applicant) v. Canadian Union of Operating Engineers and General Workers, Local 111, (Respondent).

Unit: "all employees of M & O Bus Lines (Handicab) Limited at Nepean, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff, maintenance workers and mechanics, and persons regularly employed for not more than twenty-four hours per week." (34 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		37
Number of persons who cast ballots	32	7
Number of ballots marked in favour of respondent		25
Number of ballots marked against respondent		

**2777-82-R:** Maria Fatima Costa, (Applicant) v. Fur, Leather, Shoe & Allied Workers' Union, Local 82, affiliated with United Food & Commercial Workers' International Union, A F of L, C I O & C L C, (Respondents). (100 employees in unit). (*Dismissed*).

**0049-83-R:** David Tiburcio, (Applicant) v. Service Employees' International Union, Local 204, (Respondent) v. Don Mills Foundation for Senior Citizens Inc., (Intervener). (*Dismissed*).

**0054-83-R:** Janet May Eby, (Applicant) v. United Automobile Workers International Union Local 27, (Respondent) v. Advanced Wire Die Ltd., (Intervener).

Unit: "all production and maintenance employees, excluding foremen and other supervisors, persons above the rank of foreman, office and clerical employees, guards, sales staff, quality control analysts, professional and technical employees, janitors who clean the office area, and any other part-time employees of the intervener at 108 Newbold Ct., London South, Middlesex, Ontario." (10 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	8	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		7

**0158-83-R:** Ronald Manklow, (Applicant) v. Toronto Printing Pressmen and Assistants Union No. 10, (Respondents) v. Samuel Bingham Company (Canada) Ltd., (Intervener).

Unit: "all employees of the employer in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (10 employees in unit). (*Dismissed*).

Number of persons on list as originally prepared		12
Number of persons who cast ballots	11	
Number of ballots marked in favour of respondent		6
Number of ballots marked against respondent		5

**0238-83-R:** H & R Mechanical Installation Limited, (Applicant) v. The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Respondent). (*Dismissed*).

**0293-83-R:** Lesia Murphy, (Applicant) v. Retail, Commercial & Industrial Union, Local 206, Chartered by United Food & Commercial Workers International Union, (Respondent) v. Fabricland, (Intervener). (5 employees in unit). (*Dismissed*).

**0324-83-R:** Pamela Nadine Stewart, Mary John Gow, Shirley Emma Campbell, Donna Jean Whitehead, Phyllis Isabel McNeil and Margaret Edith Lyle, (Applicants) v. The Ontario Nurses' Association, (Respondent) v. The Bobier Convalescent Home, (Intervener). (6 employees in unit). (*Dismissed*).

**0444-83-R:** Paul B. Morton, (Applicant) v. International Beverage Dispensers' and Bartenders' Union, Local 280, (Respondent). (3 employees in unit). (*Dismissed*).

## APPLICATION FOR DECLARATION OF UNLAWFUL STRIKE

**0405-83-U:** Windsor Arms Hotel Limited, (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Respondent). (*Withdrawn*).

## APPLICATION FOR DECLARATION OF UNLAWFUL STRIKE CONSTRUCTION INDUSTRY

**0527-83-U:** Bramalea Limited, (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Locals 1190 and 675, Peter Scarcella, C. Desantis, J. Machado, Francesco Grego et al, (Respondents). (*Withdrawn*).



## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**1800-81-U** Mauri Ahokas, Dale Anderson, Gerry Bannon, et al, (Complainants) v. The Canadian Union of Public Employees, Local 87, Canadian Union of Public Employees, Grace Hartman, G. LeBel, Eileen Okerlund, William McFarlane, Gloria Welch, Arlene Parker and Eileen Rice, (Respondents). (*Granted*).

**0052-82-U:** International Ladies Garment Workers' Union, (Complainant) v. Apple Bee Shirts Limited, (Respondent). (*Granted*).

**0311-82-U:** Antonio Rodrigues, Mrs. Antonio Rodrigues and Maria Oliveira, (Complainant) v. International Ladies Garment Workers' Union, (Respondent). (*Dismissed*).

**0511-82-U; 0436-82-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (Complainant) v. Wilco-Canada Inc., (Respondent). (*Granted*).

**1166-82-U:** Mrs. Odete Fonseca and Others, (Complainants) v. Rollstamp Manufacturing Ltd., (Respondent). (*Dismissed*).

**1279-82-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (Complainant) v. Wilco-Canada Inc., (Respondent). (*Granted*).

**1373-82-U:** The Master Insulators' Association of Ontario, Incorporated, (Complainant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Respondent). (*Dismissed*).

**1546-82-U:** United Food and Commercial Workers International Union, AFL, CIO, CLC, Region 18 on behalf of its Local 596, (Complainant) v. The National Bank, Price Waterhouse Ltd., The Federal Business Development Bank and Touche, Ross Limited, (Respondents). (*Granted*).

**1731-82-U; 1732-82-U; 1733-82-U:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Wark Milk Transport Limited, (Respondent). (*Withdrawn*).

**2240-82-U:** Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Complainant) v. 3R Timber Inc., (Respondent). (*Withdrawn*).

**2286-82-U; 2287-82-U:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Complainant) v. The Constellation Hotel Corporation Ltd., (Respondent). (*Withdrawn*).

**2370-82-U:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Complainant) v. The Constellation Hotel Corporation Ltd., (Respondent). (*Withdrawn*).

**2406-82-U:** Eric Dunkley, (Complainant) v. Canadian Union of Operating Engineers, General Workers, (Respondent) v. Cryovac, Division of W. R. Grace and Co. Ltd., (Intervener). (*Dismissed*).

**2569-82-U:** Gary A. Clark, (Complainant) v. Local #1 Bricklayers & Masons, (Respondent). (*Withdrawn*).

**2578-82-U:** Canadian Union of Public Employees, (Complainant) v. Thomas Toddlers Limited, (Respondent). (*Withdrawn*).

**2653-82-U:** Employees of Manor Cleaners Ltd., (Complainant) v. Textile Processors, Service Trade, Health Care, Professional and Technical Employees International Union, Local 351, (Respondent). (*Granted*).

**2606-82-U:** Canadian Union of Public Employees, (Complainant) v. Thomas Toddlers Limited, (Respondent). (*Granted*).

**2698-82-U:** United Food and Commercial Workers International Union AFL-CIO-CLC, (Complainant) v. Krinos Foods Canada Ltd., (Respondent). (*Withdrawn*).

**2718-82-U:** Canadian Union of Educational Workers, (Complainant) v. University of Toronto, (Respondent). (*Withdrawn*).

**2739-82-U:** Nelson Michaud, (Complainant) v. Teamsters Local Union No. 879, (Respondent) v. Quigley Services, (Intervener). (*Dismissed*).

**2746-82-U:** Teamsters Union Local 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. 489795 Ontario Ltd. O/A Mike Gal's Truck Service, (Respondent). (*Granted*).

**0007-83-U:** Gerald C. Hanson, (Applicant) v. International Molders and Allied Workers Union, Local 11 (Respondent) v. Kanmet: A Division of Massey Ferguson, (Intervener). (*Withdrawn*).

**0063-83-U:** David Anderson, (Complainant) v. LIUNA Local 837 at Hamilton, (Respondent). (*Terminated*).

**0051-83-U:** George Wasylenko, (Complainant) v. LIUNA Local 837 at Hamilton, (Respondent). (*Terminated*).

**0121-83-U:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. The Salvation Army, (Respondent). (*Withdrawn*).

**0126-83-U:** Boyd Ralph, (Complainant) v. I.U.E., (Respondent) v. Inglis of Canada Ltd., (Intervener). (*Dismissed*).

**0128-83-U:** Service Employees' International Union, Local 210, (Complainant) v. LaPointe-Fisher Nursing Home Limited, (Respondent). (*Withdrawn*).

**0133-83-U:** United Steelworkers of America, (Complainant) v. Dynamic Closures Limited, (Respondent). (*Withdrawn*).

**0141-83-U; 0176-83-U:** Canadian Union of Public Employees, (Complainant) v. Thomas Toddlers Limited, (Respondent). (*Withdrawn*).

**0205-83-U:** Canadian Union of Public Employees and its Local 2764, (Complainant) v. Marianhill Home for the Aged, Owned and operated by the Grey Sisters of the Immaculate Conception, (Respondent). (*Withdrawn*).

**0221-83-U:** Ontario Nurses' Association, (Complainant) v. Oaklands Regional Centre, (Respondent). (*Withdrawn*).

**0223-83-U:** Ontario Nurses' Association, (Complainant) v. Borough of East York Health Unit, (Respondent). (*Withdrawn*).

**0232-83-U:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, Local 128, (Complainant) v. Calorific Construction Company, (Respondent). (*Granted*).

**0234-83-U:** Upholsterers' International Union of North America, (Complainant) v. Bedford Bedding & Upholstery Co. Ltd., (Respondent). (*Withdrawn*).

**0269-83-U:** Todd Bradley Lindstrom, (Complainant) v. 500139 Ontario Inc., Operating as The Potato Centre, (Respondent). (*Granted*).

**0270-83-U:** Retail, Wholesale, and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Morton Tobacco Limited, (Respondent). (*Withdrawn*).

**0252-83-U:** Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa, (Complainant) v. Murray Macy & The Mill Restaurant, (Respondent). (*Withdrawn*).

**0277-83-U:** Erich Pest, (Complainant) v. Ontario Public Service Employees Union, (Respondent) v. Conestoga College of Applied Arts & Technology, (Intervener). (*Dismissed*).

**0286-83-U:** Euline Philbert, (Complainant) v. International Brotherhood of Pottery and Allied Workers, Local 336, (Respondent). (*Withdrawn*).

**0292-83-U:** Piber Mirko, (Complainant) v. U.A.W. Local 399, (Respondent) v. Arrowhead Metals Ltd., (Intervener). (*Dismissed*).

**0295-83-U:** United Textile Workers of America, (Complainant) v. Silknet Ltd., (Respondent). (*Withdrawn*).

**0312-83-U:** Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Henderson Machinery Moving and Installation Limited, (Respondent). (*Withdrawn*).

**0314-83-U:** Canadian Union of Public Employees, (Complainant) v. Thomas Toddlers Limited, (Respondent). (*Withdrawn*).

**0317-83-U:** The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552, (Complainant) v. The Board of Education for the City of Windsor, (Respondent). (*Withdrawn*).

**0327-83-U:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Complainant) v. The Windsor Arms Hotel, The Food and Service Workers of Canada, (Respondent). (*Withdrawn*).

**0332-83-U:** Retail, Wholesale, and Department Store Union, AFL:CIO:CLC, (Complainant) v. Morton Tobacco Limited, (Respondent). (*Withdrawn*).

**0342-83-U:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Salvation Army, (Respondent). (*Withdrawn*).

**0357-83-U:** Hotels, Clubs, Restaurants & Tavern Employees' Union Local 261, Ottawa, (Complainant) v. Miss Ottawa Motel & Badour Shariff, owner, (Respondents). (*Withdrawn*).

**0361-83-U:** Hotels, Clubs, Restaurants & Tavern Employees' Union Local 261, Ottawa, (Complainant) v. Miss Ottawa Motel & Badour Shariff, (Respondents). (*Withdrawn*).

**0365-83-U:** Association of General Studies Teachers In Hebrew Day Schools, (Complainant) v. The Leo Baeck Day School, (Respondent). (*Withdrawn*).

**0369-83-U:** The Canadian Union of Public Employees, (Complainant) v. Pine Valley Rest Home, (Respondent). (*Withdrawn*).

**0383-83-R:** Teamsters Local Union 419, (Applicant) v. Ralston Purina Canada Inc., McPherson Warehousing Co. Ltd., (Respondent). (*Withdrawn*).

**0386-83-U:** International Beverage Dispensers' and Bartenders' Union, Local 280. H.E.R.E. Int. A.F.L.- C.I.O. - C.L.C., (Complainant) v. Queensbury Arms Hotel (445204 Ontario Limited), (Respondent). (*Withdrawn*).

**0392-83-U:** Hotels, Clubs, Restaurants & Tavern Employees' Union Local 261, Ottawa, (Complainant) v. Miss Ottawa Motel & Badour Shariff, (Respondents). (*Withdrawn*).

**0393-83-U:** The Windsor Arms Hotel Limited, (Complainant) v. Textile, Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, The Food and Service Workers of Canada, (Respondents). (*Withdrawn*).

**0411-83-U:** Service Employees International Union, Local 183, A.F.L., C.I.O., C.L.C., (Complainant) v. Quintech, Division of Lab-Volt (Quebec) Limitee, (Respondents). (*Withdrawn*).

**0415-83-U:** James McDermott, (Complainant) v. Local 562 of the Sheet Metal Workers International Association, (Respondent). (*Withdrawn*).

**0416-83-U:** Dwayne Gushulak, (Complainant) v. Local No. 7879, United Steelworkers of America, (Respondent). (*Withdrawn*).

**0419-83-U:** Sherman Chan, (Complainant) v. Canadian Union of Public Employees - C.L.C. Ontario Hydro Employee's Union, Loc. 1000, (Respondent). (*Withdrawn*).

**0427-83-U:** Hotel, Clubs, Restaurants & Tavern Employees' Union Local 261, Ottawa, (Complainant) v. Miss Ottawa Motel & Badour Shariff, (Respondents). (*Withdrawn*).

**0428-83-U:** Vito Germano, (Complainant) v. The Employees Association of Canron Inc., (Respondent). (*Withdrawn*).

**0436-83-U:** Ontario Nurses' Association, (Complainant) v. Edward Street Manor Nursing Home, (Respondent). (*Withdrawn*).

**0456-82-U:** Canadian Paperworkers Union and its Locals 308, 309, 595, 934, 1196, and 1597, (Complainants) v. Domtar Packaging, (Respondent). (*Withdrawn*).

**0484-83-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. A.W.K. Industrial Coating, (Respondent). (*Withdrawn*).

**0495-83-U:** Local 280, International Beverage Dispensers' and Bartenders' Union, In. H.E.R.E., (Complainant) v. Bill Kaladaras, Gasworks Tavern, (Respondent). (*Withdrawn*).

**0496-83-U:** Local 280 of the International Beverage Dispensers' and Bartenders' Union, H.E.R.E., (Complainant) v. Stan Edwards, Drake Hotel, (Respondent). (*Withdrawn*).



**0537-83-U:** Sheet Metal Workers International Association (Local 235), (Complainant) v. A & G Metro Roofing Ltd., (Respondent). (*Withdrawn*).

**0560-83-U:** Henry L. Buffett, (Complainant) v. Local 7135 Canadian Paperworkers Union, (Respondent). (*Withdrawn*).

## APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

**0240-83-M:** Work Wear Corporation of Canada Ltd. (Waterloo Division), (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Trade Union). (*Granted*).

**0241-83-M:** Work Wear Corporation of Canada Ltd., (Belleville), (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Trade Union). (*Granted*).

**0256-83-M:** Oxford Picture Frame Co. Limited, (Employer) v. International Union of Allied, Novelty and Production Workers, Local 905, (Trade Union). (*Granted*).

**0404-83-M:** The Textile Rental Institute of Ontario, by and on behalf of Booth Avenue Hospital Laundry Inc., Centennial Hospital Linen Services, and London Hospital Linen Services, (Employers) v. Textile Processors, Services Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Trade Union). (*Granted*).

**0464-83-M:** Work Wear Corporation of Canada Ltd. Sault Ste. Marie, Ontario, (Employer) v. Retail, Wholesale, & Department Store Union, Local 582, AFL:CIO:CLC, (Trade Union). (*Granted*).

## TRUSTEESHIP

**T-125-82:** Office and Professional Employees International Union by Gaetan Breton, Trustee, (Applicant) v. Group of Employees, (Intervenors). (*Granted*).

## FINANCIAL STATEMENT

**2389-82-M:** Albert B. Nowak, (Complainant) v. J. Fiorito, President L.U. 1565 I.B.E.W., (Respondent). (*Dismissed*).

**2597-82-M:** Robert J. Cheetham, (Complainant) v. Metal Foil Workers Local 1663, (Respondent). (*Dismissed*).

## JURISDICTIONAL DISPUTES

**1117-82-JD:** International Association of Machinists and Aerospace Workers, (Complainant) v. Ontario Hydro & International Union of Operating Engineers, (Respondents) v. Lake Ontario District Council United Brotherhood of Carpenters and Joiners of America, (Intervener). (*Granted*).

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**2419-82-M:** Canadian Union of Public Employees, Local 2276, (Applicant) v. Port Colborne District Association for the Mentally Retarded, (Respondent). (*Dismissed*).

**2738-82-M:** The Wentworth County Board of Education, (Applicant) v. Canadian Union of Public Employees, Local 1572, (Respondent). (*Dismissed*).

**0287-83-M:** Service Employees International Union, Local 268, (Applicant) v. Nipigon District Memorial Hospital, (Respondent). (*Granted*).

**0289-83-M:** Service Employees International Union, Local 268, (Applicant) v. Manitouwadge General Hospital, (Respondent). (*Withdrawn*).

**0288-83-M:** Service Employees International Union, Local 268, (Applicant) v. Wilson Memorial General Hospital, (Respondent). (*Withdrawn*).

## COMPLAINT UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**1589-81-OH:** Richard Arnold and Other Members of Local 127 U.A.W. International Harvester Bargaining Unit, (Complainants) v. International Harvester Company of Canada, Limited, Chatham, Ontario, (Respondent). (*Granted*).

## CONSTRUCTION INDUSTRY GRIEVANCES

**1490-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 1256, (Applicant) v. McKay-Cocker Construction Ltd., (Respondent). (*Withdrawn*).

**2295-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Newman Bros. Limited, (Respondent). (*Withdrawn*).

**2650-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Dominion Stores Limited, (Respondent). (*Granted*).

**2697-82-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 785, (Applicant) v. Grand Valley Construction Association and Carpenters Employer Bargaining Agency, (Respondents). (*Granted*).

**0013-83-M:** Pumcrete Limited, (Applicant) v. International Union of Operating Engineers, Local 793, (Respondent). (*Withdrawn*).

**0085-83-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Westside Construction Ltd., (Respondent). (*Granted*).

**0084-83-M:** Ontario Sheet Metal Workers Conference for Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539, & 562, (Applicant) v. Ontario Sheet Metal and Air Handling Group; and S. E. Rozell and Sons Inc., (Respondent). (*Withdrawn*).

**0166-83-M:** Local Union 93, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Designs by Bernie Peck, (Respondent). (*Granted*).

**0318-83-M:** United Brotherhood of Carpenters & Joiners of America, Local Union 18, (Applicant) v. Osgood Floor Coverings Limited, (Respondent). (*Granted*).

**0360-83-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Denovellis & Valente Conc. & Drain, (Respondent). (*Dismissed*).

**0379-83-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Mark O'Connor Disposal and Demolition Limited, (Respondent). (*Withdrawn*).

**0390-83-M:** Labourers' International Union of North America, Local 1081, (Applicant) v. Leo Jan Mansonry Limited, (Respondent). (*Withdrawn*).

**0391-83-M:** Labourers' International Union of North America, Local 1059, (Applicant) v. Dater Excavating Limited, (Respondent). (*Granted*).

**0397-83-M:** Sheet Metal Workers' International Association, Local Union No. 504, (Applicant) v. S & E Mechanical, A Division of 471177 Ontario Limited, (Respondent). (*Granted*).

**0399-83-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Employer Bargaining Agency and its Affiliate Aldershot Contractors Equipment Rental Limited, (Respondent). (*Withdrawn*).

**0400-83-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Bono General Construction Limited, (Respondent). (*Withdrawn*).

**0401-83-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Yellow Jacket Welding Co. Ltd., (Respondent). (*Granted*).

**0402-83-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Zicardo Concrete & Drain Ltd., (Respondent). (*Withdrawn*).

**0403-83-M:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, (Applicant) v. Waltham Steel Erectors Ltd., (Respondent). (*Granted*).

**0424-83-M:** The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, on behalf of Local 853, (Applicant) v. The Canadian Automatic Sprinkler Association and Aquatic Fire Protection Limited, (Respondent). (*Granted*).

**0478-83-M:** Construction Workers Local 53, CLAC, (Applicant) v. Sass Manufacturing Limited, (Respondent). (*Withdrawn*).

**0499-83-M:** Labourers' International Union of North America, Local 1059, (Applicant) v. J.A. MacDonald (London) Ltd., (Respondent). (*Withdrawn*).

**0506-83-M:** Resilient Floor Workers Local Union 2965, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Hellenic Floor Covering, (Respondent). (*Withdrawn*).

**0507-83-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Towland-Hewitson Construction Limited, (Respondent). (*Withdrawn*).

**0529-83-M:** Labourers' International Union of North America, Local 527, (Applicant) v. Sly Crete Co. Ltd., (Respondent). (*Granted*).

**0534-83-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Taurus Construction and Marine, (Respondents). (*Withdrawn*).

**0535-83-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Memme Excavating Co. Limited, (Respondent). (*Withdrawn*).

**0540-83-M; 0541-83-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Eva Insulation Inc., (Respondent). (*Withdrawn*).

**0551-83-M:** United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Nation Drywall Contractors Ltd., (Respondent). (*Withdrawn*).

**0563-83-M:** United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Ottawa G.S.B., Construction Co., (Respondent). (*Withdrawn*).

**0564-83-M:** The Toronto-Central Ontario Building and Construction Trades Council, on its own behalf and on behalf of the International Association of Bridge, Structural and Ornamental Ironworkers, Local 721, (Applicant) v. Q-Sons Construction Company Limited, (Respondent). (*Withdrawn*).

**0585-83-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Art Giroux Fencing & Contracting, (Respondent). (*Withdrawn*).

**0596-83-M:** International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. Metro Painters & Paperhanging Ltd., 536009 Ontario Limited carrying on business as General Painting & Services Co. and 415545 Ontario Limited, (Respondents). (*Withdrawn*).

**0600-83-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Canadian Stebbins Engineering & Mfg. Co. Limited, (Respondent). (*Withdrawn*).

**0621-83-M:** L.I.U.N.A., Local 506, (Applicant) v. G.A.D., (Respondent). (*Withdrawn*).

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**1614-81-R:** International Brotherhood of Painters and Allied Trades - Local Union 1891, (Applicant) v. Johnsons Painting Co. Ltd., (Respondent). (*Denied*).

**0035-82-M:** Labourers' International Union of North America, Local 1081, (Applicant) v. Thomas Construction (Galt) Limited, (Respondent). (*Denied*).

**0875-82-R:** Cornelius Zondag, (Applicant) v. Labourers' International Union of North America, Local 1081, (Respondent) v. Thomas Construction (Galt) Limited, (Intervener). (*Denied*).

**1395-82-U:** Amalgamated Clothing & Textile Workers' Union, (Complainant) v. Sunshine T-Shirts Inc., (Respondent). (*Granted*).



**2296-82-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Western Ontario Truck Centre Inc., (Respondent) v. Group of Employees, (Objectors). (*Denied*).

**2339-82-R:** Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. BioShell Inc., (Respondent) v. Canadian Paperworkers Union, (Intervener) v. Group of Employees, (Objectors). (*Denied*).

## **CROWN TRANSFER ACT**

**2347-82-R:** Ontario Public Service Employees Union, (Applicant) v. Her Majesty The Queen in Right of Ontario, (Respondent). (*Granted*).









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